FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DECISIONS

OCTOBER 1985

Commission Decisions

Administrative Law Judge Decisions

Review was Granted in the following case during the month of October:

Secretary of Labor on behalf of Richard Truex v. Consolidation Coal Company, WEVA 85-151-D. (Judge Melick, September 30, 1985)

There were no cases in which review was Denied.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 17, 1985

THE NACCO MINING COMPANY	:	
	:	
v.	:	Docket No. LAKE 85-87-R
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	
and	:	
	:	
UNITED MINE WORKERS OF AMERICA	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

On September 13, 1985, Nacco Mining Company notified the Commission of its belief that an ex parte communication between the presiding administrative law judge, Joseph B. Kennedy, and a witness who had testified before him had occurred subsequent to the hearing in this matter. According to NACCO, it had requested the judge to place a statement detailing the conversation in the public record, but the judge had not done so.

On September 17, the Commission issued an order directing the judge and the witness to submit sworn statements "making a full and complete disclosure of all circumstances surrounding the alleged conversation and all details of its substance." Both participants to the conversation have submitted the ordered statements, although it must be noted that the judge's statement is much in the nature of an argumentative brief. Nacco has filed a response to the judge's statement in the form of a rebuttal.

Based on our review of these submissions we conclude that an ex parte communication within the meaning of 5 U.S.C. § 551 (14) occurred when the miner who had appeared before the judge as a witness contacted the judge to tell him that he believed that the operator subsequently had threatened his job. This is especially true in the present case where the witness was the individual who engaged in the conduct causing the operator to be charged with a violation of the Act. This communication did not concern the merits of the review proceeding pending before the judge, however, and therefore was not a prohibited ex parte communication under 5 U.S.C. § 557(d) and 29 C.F.R. § 2700.82. Nevertheless, in Knox County Stone Co., 3 FMSHRC 2478 (Nov. 1981), the Commission required that when even "innocent or de minimis ex parte communications occur ... they shall be placed on the public record...." 3 FMSHRC at 2486. The judge states that immediately after his conversation with the miner he placed his contemporaneous notes of the conversation in the "public record" and arranged a conference telephone call among all parties during which the substance of the earlier call was reiterated. 1/ The judge suggests that in doing so he fulfilled all applicable requirements.

It is evident from the record, however, that the judge never informed the operator of the fact that he had placed his notes in the record. In fact, after the operator respectfully requested the judge to place a statement describing the nature of the conversation in the record, the judge failed to follow through on his "first thought .. to give [NACCO] a statement, together with a copy of the notes of the conversation ... which were in the public record." Statement at 9. Instead of following this course, which is the obvious and proper method of addressing the operator's legitimate concerns, the judge, without explanation, scheduled a further hearing for the purported purpose of allowing questioning of the miner-witness regarding the conversation. In doing so the judge erred. Although a judge has discretion in regulating the course of proceedings before him, in this instance there is no record support justifying such a further hearing. The "conspiracy" theory espoused by the judge is utterly lacking in record foundation. In this scenario, conjured up by the judge, the operator's attorney may have caused the operator's foreman to "threaten" the miner, knowing that the miner would then contact the judge, thereby allowing the operator's attorney to move to have the judge removed from the case. This unsupported speculation on the part of the judge plainly is an insufficient basis for subjecting the parties to a further hearing. Therefore, the judge's order scheduling a further hearing is vacated.

Since the statements initially sought by the operator have now been placed in the record, the case is returned to the judge for necessary further proceedings on the merits. Before we do so, however, we briefly address certain other areas of concern. First, we reject the judge's

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1/ We will assume that the notes were, in fact, placed in the official public record. This assumption is not made without some pause, however. In footnote 9 of his statement the judge attempts to broaden the meaning of public record. As the judge is well aware, there is only one official public record associated with every Commission docket. A document is either in such record or it is not.

attempt to justify his solicitation of the off-the-record contact with the miner-witness that occurred. Whether the judge was motivated by section 105(c) of the Mine Act, 30 U.S.C. § 815(c), or the Federal Victim and Witness Protection Act, 18 U.S.C. §§ 1512-1515, those statutes place the responsibilities sought to be assumed by him in the hands of law enforcement personnel, not administrative law judges of this adjudicatory Commission. If the judge wishes to advise witnesses before him of their rights under federal statutes he should at least make sure his advice is accurate. By seeking to assume the role statutorily placed in other federal departments the judge has confused the adjudicatory function of this agency with the prosecutorial function of MSHA. Second, while we are aware of the concern raised by the operator regarding whether, in light of the tenor and content of certain statements in the judge's submission, a fair decision on the merits of the proceedings can be rendered by the judge, the better course of action is to provide the judge the opportunity to render a final decision based strictly on the record and in accordance with the Commission's rules and the requirements of the APA. Upon completion of this duty, the usual review mechanism is available for measuring the judge's findings and conclusions against applicable standards.

Accordingly, our previously imposed stay of proceedings is dissolved and the case is returned to the judge for briefing by the parties on the merits, if desired, and entry of a final disposition on the merits.

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

Paul Reidl, Esq.
Timothy Biddle, Esq.
 for NACCO Mining Company
Crowell & Moring
1100 Connecticut Ave., N.W.
Washington, D.C. 20036

Thomas Myers, Esq.
United Mine Workers of America
District 6 Office
5600 Dilles Bottom
Shadyside, Ohio 43947

Patrick Zohn, Esq.
Office of the Solicitor
U. S. Department of Labor
881 Federal Office Bldg.
1240 East Ninth Street
Cleveland, Ohio 44199

Michael McCord, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Administrative Law Judge Joseph Kennedy
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 1 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 83-129
	:	A.C. No. 36-03425-03522
v.	:	
	:	Maple Creek No. 2 Mine
U.S. STEEL MINING COMPANY, INC., Respondent	:	

SUPPLEMENTAL DECISION

Before: Judge Koutras

Statement of the Case

On August 5, 1985, the Commission remanded this matter to me for further consideration and findings consistent with its decision and remand. With regard to Citation No. 2102619, concerning a violation of mandatory safety standard 30 C.F.R. § 75.316, the Commission reversed my finding that the violation was not significant and substantial (S&S), and remanded the matter for an assessment of an appropriate penalty. In my original decision of July 11, 1984, although I affirmed the violation, I vacated the inspector's "S&S" finding and concluded that the violation was not "S&S." On the basis of these findings, and taking into account the civil penalty criteria found in section 110(i) of the Act, I assessed a civil penalty in the amount of $75, for the citation in question.

With regard to Citation No. 2102609, concerning a violation of mandatory safety standard 30 C.F.R. § 75.200, although I concluded in my original decision that the respondent had not violated its roof-control plan, I nonetheless found that MSHA had established a violation of section 75.200, in that the evidence presented established that one of the two miners who simultaneously installed the two roof jacks in question within the full view of the inspector was under unsupported roof when he proceeded to install one of

the jacks. My finding in this regard was based on the prohibition found in section 75.200, that "no person shall proceed beyond the last permanent support unless adequate temporary support is provided."

The Commission vacated my conclusion that section 75.200 was violated, and remanded the citation with the following comments:

> The citation issued by the inspector asserted that the roof-control plan was violated in that the temporary jacks were not installed in accordance with the approved plan. According to the inspector, the plan was violated when temporary jacks were set out of sequence and two temporary jacks were set simultaneously. The inspector testified that the roof-control plan requires that temporary jacks be set from rib to rib, one jack at a time. On the other hand, U.S. Steel's chief mine inspector, who participated in the roof-control plan adoption/approval process, testified that the plan requires that the temporary jacks be set by rows, but does not require that they be set sequentially.
>
> The judge's decision does not resolve this conflict as to the meaning of the roof-control plan. Instead, after setting forth the conflicting evidence in great detail, the judge simply labelled it "confusing" and summarily concluded that a violation of the plan had not been established.
>
> The statute and the standard require the parties to agree on a roof-control plan. Once the operator has adopted and MSHA has approved the plan, its provisions are enforceable as though they were mandatory standards. Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976). Thus, a question concerning the parties' intent and understanding as expressed in an approved plan is an important one. Before we can undertake to determine whether a plan was violated, we first need findings as to what the plan requires. Shamrock Coal Co., 5 FMSHRC 845, 848-52 (May 1983); Penn Allegh Coal Co., 3 FMSHRC 2757, 2769-70 (December 1981). Only after this is determined can those requirements be applied to particular facts to resolve whether a violation of the plan has occurred. Id.

> We therefore vacate the judge's conclusion that section 75.200 was violated even though the roof-control plan was not. We remand this citation so that the judge may make the necessary further findings regarding whether the roof-control plan imposes specific requirements as to the sequence in which temporary jacks must be set and, if so, whether such requirements were violated here. (Emphasis added).

Discussion

Inspector Shade first testified on direct examination that he observed two men actually install jacks 4 and 6 (Tr. 109). On cross-examination he testified that the jacks were never actually installed. He explained that he observed the men walk out under the roof with the jacks in hand and their intent was to install them at locations 4 and 6 as shown on the drawing. However, he advised them that they were out of compliance with the roof-control plan and called them back. The two men then came back with the jacks (Tr. 138-139). Mine foreman Skompski believed that the two men intended to install jacks 1 and 3, and that jack No. 2 was in place. He confirmed that Mr. Shade ordered the men to come back with the jacks, and that he issued the citation because they intended to install the jacks simultaneously rather than one at a time (Tr. 184-185).

When asked about the conflict in their testimony regarding which jacks were about to be set, Mr. Shade stated as follows (Tr. 277-278):

> THE WITNESS: Well, he might have seen it that way, but I know they were in further than that. They were in for the next two jacks and I even lectured them on it. I told them, "You can't set those jacks until you set the first row of jacks," and the foreman, he had went over the plan with them and told them the procedure to put the jacks in.

Inspector Shade testified that after the two men were called back and instructed as to the proper sequence for installing the jacks, they proceeded to install jacks 1 and 3, and then installed jacks 4, 5, and 6. Since this constituted abatement, the citation was terminated (Tr. 162).

Although the citation issued by Inspector Shade did not specify the specific part of the roof-control plan which was allegedly violated, Mr. Shade testified that it was Drawing No. 2 (hearing exhibit P-3). That drawing is identified as the Minimum Temporary and Minimum Permanent Roof Support Plan. The drawing is included as part of the plan as required by paragraph Q, pg. 4, of the overall plan, and MSHA asserts that the drawing is intended to show the sequence of installation of temporary roof support. The drawing identifies the location of roof bolts and temporary supports (posts or 10 ton hydraulic jacks). Although roof bolts are required to be installed first laterally then longitudinally as depicted on the drawing, no such requirement is stated for temporary jacks. The only instructions concerning temporary supports or jacks are the following:

> The first row of temporary supports will be installed to suit drill head clearance not to exceed 5-1/2 feet from the last row of permanent supports. Subsequent rows on 4 feet centers.
>
> Jacks A, B, C, D, 1, 4, 7 installed during mining per Drawing No. 8-F 132 MC (F). Temporary supports 2, 3, 5, 6, and 8 are set as shown. Jack A may be used in first row of temporary supports.
>
> When their respective rows of three temporary supports is complete, jacks B, C, and D may be removed and reset as temporary supports in a succeeding row.
>
> Lateral jack spacing not to exceed 5 feet.

Inspector Shade testified that under Drawing No. 2, a person may go 5-1/2 feet beyond or inby permanent roof support for the purpose of installing the first row of temporary jacks. After that, the person may not go more than 4 feet inby or beyond that row of temporary jacks to install the second row of jacks, and he must not go more than 4 feet to install the third row. The maximum allowable lateral distance between jacks is 5 feet (Tr. 258). Conceding that the roof-control plan does not specifically prohibit the installation of two jacks simultaneously, Mr. Shade nonetheless insisted that the plan does provide for a particular sequence for roof jack installation. In his view, the jacks should be installed in numerical sequence starting with jack No. 1, but he conceded that MSHA has permitted the operator

to reverse the order of installation in any given row of jacks, i.e., No. 3, No. 2, and No. 1 (Tr. 106-107).

Assistant Mine Foreman Joseph Skompski testified that standard good mining practice calls for the installation of the temporary roof supports from rib-to-rib (Tr. 183). According to his interpretation of the roof-control plan, roof jacks are to be installed in sequence, row-by-row (Tr. 178). The only exception noted by Mr. Skompski concerned loose or drummy roof areas which may have to be supported by jacks installed out of sequence.

Respondent's safety director Samuel Cortis indicated that once the mining phase is completed, the temporary roof support plan depicted by Drawing No. 2 comes into play. While Mr. Cortis did not personally draft Drawing No. 2, he indicated that he reviewed it and made corrections, and that "it's very close to what I wanted" (Tr. 238). He explained that the plan calls for the installation of eight units of roof supports (jacks) placed in three rows across the work place. He indicated that the numbers 1 through 8 as shown on the drawing simply identify eight units of temporary roof support. The first row of jacks is set 5-1/2 feet ahead of the last row of permanent roof supports, and the second row is set 4 feet inby that point (Tr. 215-216).

Mr. Cortis stated that jacks 1, 4, and 7 are interchangeable with the roof support plan used on the bolting cycle. He also indicated that once a row of three numbered jacks are installed, the alphabetically labeled ventilation canvass jacks can be removed and set in the next row (Tr. 216). He also stated that under MSHA's interpretation of the drawing, once the first row of roof bolts is installed, any one of the jacks labeled 1, 2, and 3 may be removed and placed in the area shown as a "dotted 1" between jacks 7 and 8 as shown on the drawing. In his opinion, the intent of the drawing is that the jacks are set row-by-row (Tr. 217).

Mr. Cortis was of the view that Drawing No. 2 does not require that the jacks be installed in any particular numerical sequence. As an example, he stated that assuming that jacks 1, 2, and 3 were in place, the next row of jacks may be installed by starting with jack 6, and then going to 5 and 4 (Tr. 222). Assuming that there was permanent or temporary roof support within the required 5 or 5-1/2 feet, a person starting the installation of the first row of jacks by beginning with the center jack No. 2 would not be in violation of the drawing (Tr. 218). However, if that person went out and first installed Jack No. 5 instead of No. 2, he

would be in violation because he would not be within the 5 to 5-1/2 feet of either permanent or temporary roof protection (Tr. 219). Assuming that jacks 1, 2, and 3 are in place, Mr. Cortis believed that drawing 2 would not prohibit anyone from next installing jack 5, rather than 6, as long as jack 2 was within 5 feet of him for protection (Tr. 223). In his view, the key lies in how far one ventures out from under permanent or temporary roof support (Tr. 241).

Findings and Conclusions

Citation No. 2102609, 30 C.F.R. § 75.200

I take note of the fact that when this case was before me for adjudication, MSHA's counsel did not file a posthearing brief explaining MSHA's interpretation of the roof-control plan. One possible explanation for this is that trial counsel was just as confused as I was with respect to the inspector's interpretation and application of the plan. Upon reexamination of the roof-control plan, I am still not convinced that Drawing No. 2 is clear as to the sequence for installing temporary roof support, nor am I convinced that it specifically prohibits the simultaneous installation of such support.

I believe that Inspector Shade was particularly concerned over the fact that two men proceeded to install two jacks simultaneously, and that this exposed more men than was necessary to unsupported roof. The record reflects that when he arrived on the scene, jack No. 2 was in place. He testified that the two men intended to install jacks No. 4 and No. 6. After he called the men back, and before any installation could be done, he instructed them as to the proper installation sequence, and they then proceeded to install jacks No. 1 and No. 3, and then installed jacks No. 4, No. 5, and No. 6. He believed that this was the proper installation sequence. At the same time, he conceded that the roof plan does not prohibit the simultaneous installation of temporary support, and that MSHA has permitted U.S. Steel to reverse the numerical order of installation in any given row of roof jacks.

Assistant Mine Foreman Skompski's interpretation of Drawing No. 2, is that temporary roof support is normally installed in sequence, row-by-row. Safety Director Cortis was of the opinion that the intent of the drawing is that the jacks be installed row-by-row, but in no particular numerical sequence in any given row. Since the evidence establishes that the two men in question were about to

install jacks No. 4 and No. 6 when called back by Inspector Shade, I conclude and find that they did not intend to install the jacks row-by-row. I accept the interpretation of the drawing by Mr. Skompski and Mr. Cortis as reasonable, and since the two men cited were not in compliance with that interpretation, I now conclude and find that the respondent violated this row-by-row installation requirement of Drawing No. 2. To that extent, my previous decision of July 11, 1984, is supplemented to include these additional findings. The original findings and conclusions concerning a violation of section 75.200, are reaffirmed as issued.

I note that on page 52 of my decision of July 11, 1984, section 75.503, is listed as the standard violated in connection with Citation No. 2102609. That is in error. The correct section number is 75.200, and my decision is amended to reflect this correction.

Page one of my decision of July 11, 1984, reflects that petitioner MSHA filed posthearing arguments, and that the respondent did not. This is in error. U.S. Steel filed a brief, but MSHA did not. My decision is amended to reflect this fact.

ORDER

Citation No. 2102619, 30 C.F.R. § 75.316

In view of the Commision's reversal of my original non-"S&S" finding for this violation, my original civil penalty in the amount of $75 is amended, and I concude that a civil penalty in the amount of $125 is appropriate and reasonable for the violation. Respondent IS ORDERED to pay this civil penalty within thirty (30) days of the date of this supplemental decision and order.

George A. Koutras
Administrative Law Judge

Distribution:

Janine C. Gismondi, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Louise Q. Symons, Esq., U.S. Steel Mining Company, Inc., 600 Grant Street, Pittsburgh, PA 15230 (Certified Mail)

Cynthia Attwood, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 1, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 85-131 A. C. No. 36-00808-03527
v.	:	Russellton Mine
BCNR MINING CORPORATION, Respondent	:	

DECISION

Appearances: John S. Chinian, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Bronius K. Taoras, Esq., BCNR Mining Corporation, Meadowlands, Pennsylvania, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Secretary under section 110 of the Act against BCNR Mining Corporation for a violation of 30 C.F.R. § 77.1710(g) involving a fatality. A hearing on the merits was held on June 11, 1985, and the parties now have filed post-hearing briefs.

The subject citation describes the violative condition or practice as follows:

> During the course of a fatal fall of person [sic] accident investigation it was revealed that the victim was not wearing a safety belt and line when he placed his body between the top and middle guard rails around an opening on the fourth floor of the preparation plant. The victim was attempting to free a ladder wedged between beams inside the opening and when the ladder became free, he lost his balance and fell to the concrete ground floor, a distance of about 49 feet.
>
> * * * *

30 C.F.R. § 77.1710(g) provides as follows:

> Each employee working in a surface coal mine or in

> the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:
>
> * * *
>
> (g) Safety belts and lines where there is danger of falling; * * *

The subject fatality occurred under the following circumstances: About 9:10 p.m. on June 8, 1984, the afternoon shift foreman at respondent's preparation plant instructed Mr. Kerleski, a repairman, to fix a leaking flange in the chance cone separator of the plant (Tr. 12-13). The foreman sent the decedent, also a repairman, to help Kerleski (Tr. 15, 102). In connection with the repair job, the two men tried to raise a 20 foot ladder to the fourth floor level of the plant, first using an electric hoist and then a rope (Tr. 13-14). The ladder became wedged between an angle brace on the fifth floor and a floor support beam on the fourth (Tr. 14). In order to free the ladder the decedent first started to go over the railing on the fifth floor but Kerleski told him not to (Tr. 14, 36). Kerleski unsuccessfully pushed against the ladder from the fourth floor (Tr. 36). Then the decedent tried pushing against the ladder (Tr. 15-16). According to the first MSHA inspector who testified, the accident investigation disclosed that the decedent was kneeling on one knee, holding a tow board with one hand, placing his body above the waist out between the middle and top railings and pushing with his other hand against the stuck ladder (Tr. 16-18). The inspector testified that when the ladder broke free, the decedent lost his support and fell through the railings for a distance of 49 feet (Tr. 19). The decedent was taken to the hospital where he died a few hours later from injuries suffered in the fall (MSHA Exhibit No. 23, p. 5). The operator's plant foreman expressed the view that the decedent was down on both knees not just one, and was bending through the handrails (Tr. 76-85). I find the foreman's testimony unclear and confused. The inspector's description of what happened and how the decedent was positioned was clear and straightforward and I accept it.

The first issue to be decided is whether the cited standard applies, i.e., was there a danger of falling. The Commission has held that the test is whether an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts. Great Western Electric Company, 5 FMSHRC 840 (1983). I conclude that an informed, reasonably prudent person would have recognized the danger of falling in this instance. The risk of falling from putting one's body out so far and pushing against a ladder should have been clear to any reasonably prudent person. Indeed, in Great Western Electric Company a risk of falling was held to be present in circumstances somewhat analogous, but less compelling than the instant matter. In that case the miner was on the ladder leaning over to change light bulbs. The Commission noted that the situation involved a shift in the

miner's physical center of gravity, which is what was present here, except in this case the shift in balance was far more extreme because the decedent deliberately pushed against the ladder to free it and when he did so, the freed ladder no longer supported him and he fell.

It next must be determined whether the operator's actions satisfy the mandate of section 77.1710(g) that it require employees to wear safety belts in these situations. Here again, Commission decisions are determinative. In Southwestern Illinois Coal Corporation, 5 FMSHRC 1672 (1983) the Commission held that although the operator does not have to guarantee that safety belts are actually worn, its duty is one of requirement diligently enforced. According to the Commission, a violation exists where there are no signs at the mine reminding employees to wear belts, no safety analyses or directives are issued to identify specific situations where belts could be worn, no specific guidelines are given to identify specific working situations where belts should be worn, and the wearing of belts is delegated to the discretion of each employee, with only general guidance at best. More recently, in Southwestern Illinois Coal Corporation, 7 FMSHRC 610 (1985), the Commission reiterated that an operator violates this mandatory standard by not engaging in sufficiently specific and diligent enforcement of the safety belt requirement and where the decision to wear a safety belt is left largely to the miner because of an absence of any site-specific guidelines and supervision on the subject of actual fall dangers. In addition, in Southwestern II, the Commission held that although the operator has a safety program requiring the wearing of belts and miners violating the requirement are disciplined, a violation still exists where evidence is lacking of the operator's specific enforcement actions and of its diligence in site-oriented enforcement. The Commission concluded by again referring to a too broad delegation to the miner of the ultimate decision whether the wearing of a belt is necessary and too little hazard-specific guidance and supervision by the operator.

This case falls squarely within the Southwestern decisions. The operator's Job Safety Analysis merely says under the heading of Repairing Machinery, "Use Safety Belts" (Operator's Exhibit No. 1, p. 3). This bare directive is not explained or related to specific job situations. Similarly, the operator's safety rule book says that safety belts shall be worn at all times when working in and around shafts, railroad cars or on high structures of any type where a fall could cause serious injury. However, the only job identified as requiring a safety belt is that of car dropper (Operator's Exhibit No. 4, p. 45; Tr. 115). Specific job situations where a fall could cause serious injury are not given. The plant foreman testified that he read the job safety analysis to miners as part of their refresher training course and that as part of the training he also walked through the preparation plant discussing hazards (Tr. 89-90). The decedent had this training four months before the fatal accident (Tr. 37-38). However, insofar as the record indicates, the miners were told nothing

about specific situations where they should wear safety belts. Since hoisting of equipment in the preparation plant was an everyday occurrence and since a ladder had to be raised to the fourth floor once a month, the falling hazard in performing these tasks should have been pointed out by the operator (Tr. 46, 97). Here, as in the Southwestern cases, the operator's actions are too general and vague to satisfy the requirements of the mandatory standard.

The operator's safety supervisor testified that an unsafe practice slip was given to any miner who violated one of the company's safety rules (Tr. 115). Unsafe practice slips for failing to wear safety belts had only been given to car droppers and never in this type of situation (Tr. 116-117). Indeed, it is hard to see how the operator could give a miner an unsafe practice slip in a case like this, since it never indicated that belts should be worn under these circumstances. In Southwestern II, the fact that the operator disciplined miners who violated the safety belt requirement was held insufficient in the absence of too little hazard-specific guidance by the operator. The same conclusion must obtain here as well.

That the operator in this case failed to diligently enforce the wearing of safety-belts is further demonstrated by the fact that at the time of the accident the only available safety belt was in the foreman's office (Tr. 44-45). Only after the accident were safety belts placed on every other floor of the preparation plant (Tr. 41, 58). Also, there were no signs reminding the miners to wear belts (Tr. 21, 67). These circumstances further demonstrate the lack of any follow-up by the operator.

In establishing the "reasonably prudent" test in Great Western, the Commission referred to "the inherent vagaries of human behavior", 5 FMSHRC at 842. The Southwestern decisions require due diligence by the operator in enforcement of the safety belt requirement, and they proscribe the too broad delegation to the miner of the decision whether or not to wear a safety belt. What happened here is exactly what the Commission decisions forbid. The decision about safety belts was left entirely up to the men. And the dangers created by this approach stand in stark relief, because evidence of record which I accept, demonstrates that neither Kerleski nor the decedent had any prior experience in raising such a ladder to the fourth floor (Tr. 48, 66-67).

In light of the foregoing I conclude the operator violated 30 C.F.R. § 77.1710(g).

As stipulated by the parties the violation was extremely serious because it caused a fatality (Tr. 4). All the requirements for significant and substantial are met. Mathies Coal Co., 6 FMSHRC 1 (1984); Consolidation Coal Company, 6 FMSHRC 189 (1984); U. S. Steel Mining Co., 6 FMSHRC 1866 (1984).

The operator was negligent in doing so little to enforce the safety belt requirement. Its negligence is magnified because, as already pointed out, the decedent and his co-worker were inexperienced in performing the task assigned to them by the afternoon shift foreman and there was a lack of actual supervision. I recognize the foreman cannot be everywhere at the same time, but when he assigns a job which includes raising a 20 foot ladder to the fourth floor to two men who have never done this before, he must supervise them. Undoubtedly, the decedent himself was extremely careless. But this cannot exculpate the operator from being held responsible for failing to oversee inexperienced men in the performance of a hazardous job. I conclude the operator was highly negligent.

The other statutory criteria under section 110(i) are the subject of stipulations which, as set forth above, I have accepted.

The post-hearing briefs of the parties have been reviewed. Both were extremely helpful. To the extent they are inconsistent with this decision they are rejected.

A penalty of $5,000 is assessed which the operator is ORDERED TO PAY within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

John S. Chinian, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Bronius K. Taoras, Esq., Kitt Energy Corporation, 458 Race Track Road, P. O. Box 500, Meadowlands, PA 15347 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DONALD R. HALE, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. VA 85-29-D
	:	NORT CD 83-8
v.	:	
4-A COAL COMPANY, INC., Respondent	:	No. 4 Mine

ORDER

Before: Judge Kennedy

On August 29, 1985, the operator filed and served a motion to dismiss the captioned wrongful discharge case on the grounds it was untimely. Under the Commission Rules, the Secretary had 10 days to respond. The Secretary having failed to respond or otherwise oppose the operator's motion or to seasonably move for an enlargement of time, it is ORDERED that the operator's motion be, and hereby, is GRANTED and the case DISMISSED. See Rules 9, 10, and 41.

Joseph B, Kennedy
Administrative Law Judge

Distribution:

James B. Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 1237A, Arlington, VA 22203 (Certified Mail)

C. R. Bolling, Esq., 1600 Front Street, P. O. Drawer L, Richlands, VA 24641 (Certified Mail)

Mr. Ronald Schell, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Room 829, Arlington, VA 22203 (Certified Mail)

Mr. Donald R. Hale, P. O. Box 1075, Raven, VA 24639 (Certified Mail)

James Ashley, President, 4A Coal Company, Inc., Hurley, VA 24620 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

FMC CORPORATION, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 82-30-RM
v.	:	Citation No. 578746; 9/10/81
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	FMC Mine

DECISION

Appearances: John A. Snow, Esq., VanCott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Contestant;
Margaret Miller, Esq., and James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Lasher

This proceeding arose upon the filing of a Notice of Contest by Contestant on October 14, 1981, seeking, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act), to challenge Citation No. 578746 dated September 10, 1981, which was issued pursuant to Section 104(a) of the Act and which alleges a violation of 30 C.F.R. § 48.27(a) in August, 1981 (Tr. 57-63) at Contestant's mine in Sweetwater County, Wyoming, to wit:

> "A miner was assigned to operate a Case front-end loader to clean up a spill at the Mono plant. The employee had not received new task training in the operation of the Case front-end loader. The employee had been trained to operate a dozer at the stockpile. Part of his job required that he operate the loader on the off shift. This citation was written and delivered after investigation was finalized on the date September 14, 1981. This citation is not S&S."

The standard allegedly violated, 30 C.F.R. § 48.27(a), provides as follows:

> "Training of miners assigned to a task in which they have had no previous experience; minimum courses of instruction.

(a) Miners assigned to new work tasks as mobile equipment operators, drilling machine operators, haulage and conveyor systems operators, ground control machine and those in blasting operations shall not perform new work tasks in these categories until training prescribed in this paragraph and paragraph (b) of this section has been completed. This training shall not be required for miners who have been trained and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. This training shall also not be required for miners who have performed the new work tasks and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. The training program shall include the following:

(1) Health and safety aspects and safe operating procedures for work tasks, equipment, or machinery. The training shall include instruction in the health and safety aspects and safe operating procedures related to the assigned tasks, and shall be given in an on-the-job environment; and,

(2)(i) Supervised practice during nonproduction. The training shall include supervised practice in the assigned tasks, and the performance of work duties at time or places where production is not the primary objective; or,

(ii) Supervised operation during production. The training shall include, while under direct and immediate supervision and production is in progress, operation of the machine or equipment and the performance of work duties.

(3) New or modified machines and equipment. Equipment and machine operators shall be instructed in safe operating procedures applicable to new or modified machines or equipment to be installed or put into operation in the mine, which require new or different operating procedures.

(4) Such other courses as may be required by the District Manager based on circumstances and conditions at the mine.

(b) Miners under paragraph (a) of this section shall not operate the equipment or machine or engage in blasting operations without direction and immediate supervision until such miners have demonstrated safe operating procedures for the equipment or machine or blasting operation to the operator or the operator's agent.

(c) Miners assigned a new task not covered in paragraph (a) of this section shall be instructed in the safety

and health aspects and safe work procedures of the task, prior to performing such task.
(d) All training and supervised practice and operation required by this section shall be given by a qualified trainer, or a supervisor experienced in the assigned tasks, or other person experienced."
(emphasis added)

The matter came on for hearing on March 6, 1985, in Salt Lake City, Utah. Both parties were represented by counsel.

The miner described in the Citation, Billy J. Young, was employed during the month of August, 1981, and at all times pertinent to this proceeding at the FMC [1]/ mine as a "Stockpile A" operator at the so-called "Baby Sesqui" area of the mine (Tr. 62, 89 91, 107, 109, 130). His regular and customary duties included the operation of a D-7 Caterpillar bulldozer (herein "dozer") upon which he had been trained (Tr. 32, 92, 115, 116, 131). Other than on the indeterminate day in August, 1981, referred to in the Citation [2]/ he had not been required to operate a Case front-end loader ("loader") and he had not been trained to operate-or certified as qualified to operate-the same (Tr. 20, 21, 23, 24, 27, 28, 48, 89, 116, Ct. Ex. 1, 121, 122, 172). It also appears that it was not normal procedure for Contestant to ask its dozer operators to operate loaders (Tr. 100, 102, 109, 110).

One of Contestant's several contentions in this matter is that 30 C.F.R. § 48.27(a) fails to give fair notice of what is required and is constitutionally invalid. This is found to lack merit.

The regulation consists of three sentences. The general rule, a training requirement, appears in the first sentence and two exceptions thereto are then set forth - one each in the two remaining sentences. Stripped of superfluities and insofar as

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1/ The parties have stipulated that Contestant is a large mine operator engaged in the production of trona, a sodium carbonate product; that it has an average number of previous violations; that it acted in good faith to promptly achieve abate of the allegedly violative condition involved; and that payment of a penalty at the level administratively assessed would not jeopardize its ability to continue in business (Tr. 9-11).
2/ Investigation on the record (Tr. 58, 62, 93) failed to pin-point the exact day.

pertinent here the regulation provides that mobile equipment operators shall not perform new work tasks in the "mobile equipment operator" category until (prescribed) training has been completed. I find no ambiguity in it insofar as its applicability here is concerned. As the Commission has previously noted, many safety and health hazards standards must be simple and brief in order to be "broadly adaptable" to myriad circumstances. Alabama By-Products Corporation, 4 FMSHRC 2128 (1982). In that case, the standard involved, 30 C.F.R. § 75.1725(a) required that equipment be maintained in "safe operating condition." The Commission rejected the mine operator's contentions of unconstitutional vagueness and that it had not been given fair notice of the nature of the violation and applied the following test in doing so:

> "... in deciding whether machinery or equipment is in safe or unsafe operating condition, we conclude that the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation."

In comparing § 1725(a) with the standard involved here, § 48.27(a), I find little to choose between in the amount and degree of judgmental exercise and difficulty to which a reasonably prudent person would be put in deciding (1) whether a piece of equipment is in "safe" operating condition and (2) whether a particular assignment is a "new" work task.

Under section 48.27(a), "mobile equipment operator" patently is one of the categories within which a new work task, in the abstract, can be performed, and operating a new (different) piece of mobile equipment is reasonably and logically one of the ways in which one would perform a "new" work task within the "mobile equipment operator" category. Indeed, it is the first situation which comes to mind. Nevertheless, determining whether a change in a mobile equipment operator's work assignment does indeed constitute a "new work task" as contemplated by this regulation requires a case-by-case approach. Secretary v. U.S. Steel Corporation, 5 FMSHRC 3 (1983). It should not be overlooked that the miner here was not only given a different machine to operate but he also was sent to an entirely different work area.

Where there is an assignment to use new equipment, it would seem that if the new piece of equipment is essentially the same as that regularly operated by the miner in the past, or the same as a piece of equipment upon which the miner has been previously

trained and certified, then the work task involved in the new assignment should not be deemed a "new" work task and additional training should not be required. If the new equipment is significantly different, than a contrary result must obtain. 3/

The issue posed here is thus primarily factual in nature and is fairly stated in Contestant's post-hearing brief: "... whether or not the operation of the Case front-end loader by said miner constituted a task separate from the operation of the D-7 bulldozer and was therefore required to have new task training under 30 C.F.R. § 48.27(a)." We turn now to the facts bearing on this issue.

Substantial and reliable evidence in the record indicates that Contestant's training procedure was to place a miner-trainee "with an experienced operator on different pieces of equipment." Such miner, upon being trained, would then be certified to operate the particular piece of equipment by Jack Freeze, Contestant's "task trainer" and certifier (Tr. 20, 22, 27-29, 35, 116, 134, 135).

Contestant's normal training procedure was to give separate task training for the loader and for the dozer (Tr. 27, 35-37, 51, 52, 101, 102, 132, 136, 137). For one to learn the basic operation of a Case front-end loader takes approximately 4-hours after which a period ranging from 8-hours to 4 or 5 days is required with the trainer sitting with the miner/trainee for the miner to learn the loader's operation (Tr. 166).

3/ Contestant's additional contention that one of the two exceptions to the regulation's general training requirement is applicable is also found to lack merit. Contestant relies on this provision:

> "This training shall also not be required for miners who have performed new work tasks and who have demonstrated safe operating procedures for such new work tasks within 12 month preceding assignment."

The record is clear that Mr. Young had neither (1) performed nor (2) demonstrated safe operating procedures for the new work task within 12 months preceding the assignment in question. Contestant introduced no evidence to this effect. The record is also clear that Mr. Young's assignment on the day in question was for production purposes - to clean up the spill at the Mono plant - and not for training purposes. There is no support in the record for the application of either exception to the general training requirement.

The loader is substantially different from the dozer because of significant differences in weight, size, function, controls, brakes, speed, moving mechanism (wheels v. track) and steering mechanism (Tr. 32, 43-47, 54, 94, 162-164).

On the day in question, Ralph Pedem, the lead foreman at the Baby Sesqui plant, advised Mr. Young of the spill at the Mono plant and instructed him to get the loader from the yard crew who normally operated it and take it to the Mono plant and clean up the spill in a confined and small area about the size of a two-stall garage) (Tr. 22, 24, 93, 125, 176). The distance traveled by Mr. Young from the Sesqui plant to the Mono plant was approximately 1,000 yards (Tr. 92). Mr. Young was alone when he first got on the loader and he experienced trouble in starting it (Tr. 24).

It was Mr. Pedem's responsibility to decide whether or not Young was sufficiently trained to operate the loader (Tr. 138). Mr. Pedem had not trained Mr. Young on the loader, had not seen him operate a loader (Tr. 23, 24) and did not believe Young had been trained on the loader (Tr. 24).

After experiencing difficulty starting the loader. Mr. Young drove it from the Baby Sesqui area to the Mono plant (Tr. 174) where he operated it in a slow [4]/ but safe manner for approximately 30 minutes (Tr. 159). His performance in operating the loader displeased the foreman, Carl Pearson (Tr. 160, 179, 181). Mr. Pearson, did not remove him from this duty, however (Tr. 159-161, 168-171, 180), and Mr. Young himself ultimately requested that Mario Shassetz, a helper at the Mono plant, replace him on the loader (Tr. 26, 99, 160-161, 180). Mr. Young told Mr. Shassetz that he was "uncomfortable" operating the loader (Tr. 161, 168, 176). After the clean-up of the spill had been accomplished, taking a period of approximately 3 1/2 hours, Mr. Young drove the loader back to the Baby Sesqui area (Tr. 26, 175, 176).

The purpose of Mr. Young's assignment when he was called from his regular duties at the Baby Sesqui stockpile (Tr. 125) to operate the loader to clean up the spill at the Mono plant was production-related and not for training purposes (Tr. 24, 26, 93, 125, 158, 161, 174, 180).

Because of lack of training, the numerous fundamental differences between the loader and the dozer he usually operated, and the differences in the new area he was assigned to work in,

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4/ Skilled loader operators would have been able to operate the loader "quite a bit faster" (Tr. 67, 169).

Mr. Young was not able to operate the loader competently on the day in question (Tr. 67, 94, 169, 179, 193). Mr. Young was not familiar with the entirely different, small and enclosed area (Mono plant) in which he was directed to operate the loader (Tr. 169, 175, 176, 179).

In the context of the circumstances present on the day in question the hazards posed by an untrained miner, such as Mr. Young, operating a loader were (1) pinning bystanders against a wall, beam or other object, (2) running over a bystander, (3) catching them with the bucket or (4) turning the machine over on them. Two persons were in the area where Mr. Young was operating the loader. Serious injuries requiring hospitalization could have resulted from the occurrence of the enumerated hazards (Tr. 98-100, 163).

While one must agree with Contestant's position that a change of a miner's assignment to a different piece of mobile equipment does not necessarily -- or automatically -- require new task training, that result is dictated by the numerous fundamental differences between the two pieces of equipment involved here.

Mr. Young's demonstrated sub-par ability to operate the loader, the foreman's dissatisfaction with his performance, and Mr. Young's self-removal from the equipment give strong circumstantial credence to this conclusion. The record supports the Secretary's summary of the matter:

> "In August 1981 Young was required to undertake a new task in a separate part of the mine on a piece of equipment vastly different from the one he had been trained to operate. Requiring Mr. Young to undertake this new task on unfamiliar equipment was clearly a violation of 30 C.F.R. § 48.27."
>
> (Respondent's Brief, page 5).

The factual determinations articulated above make it amply clear that the infraction was of a moderately serious nature and that it resulted from the negligence of Contestant's supervisory personnel who both made the assignment of a new work task to Mr. Young and, after observation of his inept performance, permitted his continuation of the task, with the actual and constructive knowledge that he was neither sufficiently trained or certified to perform it. These and other findings with respect to the mandatory penalty assessment criteria (See Fn. 1) have been made even though this is a contest proceeding [5]/ in view of the fact

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5/ Since this is a contest proceeding no penalty is actually being assessed.

that Contestant apparently paid MSHA's administratively-assessed $78 penalty (Tr. 12) in full prior to the hearing 6/. Subsequent to hearing the Secretary, in writing has (1) declined to raise any contention that Contestant has waived its contest rights by prior payment of the penalty, and (2) stipulated to the Commission's jurisdiction to adjudicate this matter. 7/ On the basis of this record 8/ MSHA's proposed penalty is found to be within a reasonable and proper range.

ORDER

Citation No. 578746 is AFFIRMED.

All proposed findings of fact and conclusions of law not expressly incorporated in this decision are REJECTED.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

John A. Snow, Esq., and James A. Holtkamp, Esq., VanCott, Bagley, Cornwall & McCarthy, 50 S. Main Street, Suite 1600, Salt Lake City, UT 84144 (Certified Mail)

Margaret Miller, Esq., and James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

6/ See the Secretary's brief. Counsel for Contestant didn't know his client had paid the penalty at the administrative level. Indeed, neither party was aware of such payment at the hearing (Tr. 6-8) and the matter was fully litigated. It is unknown whether the payment at the administrative level was intentional or inadvertent. See Secretary v. Old Ben Coal Company, 7 FMSHRC 205 (1985). Inadvertence is inferred, however, from the fact this matter went to litigation.

7/ Fairness to the parties and counsel requires mention that this proceeding was one of a large group of cases heard over a 10-day period in Salt Lake City on relatively short notice. The cooperation of Contestant's counsel and counsel in the Labor Department's Office of the Solicitor made it possible for these matters to come to resolution. It is recognized that the unusual happenstance described undoubtedly occurred because of the extra-ordinary efforts of counsel to accommodate the Commission's schedule.

8/ Which covers the penalty assessment aspects as well as the substantive issues of the content.

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 3 1985

JAMES O. TURNER, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 84-201-D
	:	MSHA Case No. BARB CD 84-26
CHANEY CREEK COAL COMPANY, Respondent	:	

ORDER OF DISMISSAL

Before: Judge Melick

On September 26, 1985, the Complainant Mr. Turner filed a request for withdrawal of his Complaint in the captioned case. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. The case is therefore dismissed.

Gary Melick
Administrative Law Judge

Distribution:

Mr. James O. Turner, Rt. 1, Box 267, Baxter, KY 40806 (Certified Mail)

Mr. Steve Shell, Personnel Director, Chaney Creek Coal Corporation, Box 157, Manchester, KY 40962 (Certified Mail)

rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 84-14-M A.C. No. 39-00055-05519
v.	:	Homestake Mine
HOMESTAKE MINING COMPANY, Respondent	:	

DECISION

Appearances: Eliehue C. Brunson, Esq., Office of the Solicitor, Department of Labor, Kansas City, Missouri, for Petitioner;
Robert A. Amundson, Esq., Amundson & Fuller, Lead, South Dakota, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits commenced on October 30, 1984, in Rapid City, South Dakota.

The parties filed post-trial briefs.

Issues

The issues are whether respondent violated the regulations; if so, what penalties are appropriate.

Stipulation

At the commencement of the hearing the parties stipulated as follows:

Respondent is subject to the Act and operates a gold mine in Lead, South Dakota. Respondent's products enter interstate commerce. The proposed penalties, based upon the assessments, would not have a detrimental effect on the company's operation. In addition, the citations that are in issue here were properly delivered to the company during the course of an inspection.

This citation alleges respondent violated 30 C.F.R. §57.4-6 BB4 and a civil penalty of $20 is proposed.

At the hearing the Secretary moved to vacate his citation.

Pursuant to Commission Rule 11, 29 C.F.R. § 2700.11, the motion to vacate was granted.

Citation 2097665

This citation alleges respondent violated 30 C.F.R. § 57.9-2 which provides:

> 57.9-2 Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

Summary of the Evidence

MSHA inspector John C. Sprague issued this citation for a condition he observed on a Jarvis Clark Electric LHD vehicle. A button used to initiate the fire suppression system was wrapped with a piece of wire. The wire prevented the removal of the retaining pin which must be removed before the system will function (Tr. 339-343).

The wire itself held a load counting device. Such a device is used by an operator to keep a record of the number of loads. It took the operator about a minute to remove the wire. The inspector further indicated that there were over five but less than ten wraps of wire in the area of the pin. But the wire itself did not extend through the large ring which must be pulled to activate the equipment (Tr. 348-353, 384-387).

Larry M. Isaac, an LHD maintenance foreman, testified that the fire suppression device is automatic after the two-inch pin is pulled and the plunger button activated. In addition to the automatic controls, the equipment has a fire extinguisher. In the witnesses' view the operator could still pull the pin even though the blasting wire was wrapped around it (Tr. 367-374).

In Isaac's opinion, there was no equipment defect here because the hand held fire extinguisher was adequate. In his view, the automatic system is not always superior to a hand held fire extinguisher (Tr. 380-382).

Discussion

A credibility issue arises here. The pivitol issue is whether the facts establish an equipment defect. In short, did the five to ten wraps of the blasting wire prevent the ready activation of the automatic fire suppression equipment.

I am persuaded that the pin which activates the device could not be readily pulled.

The photograph (Exhibit C) shows the wire was wrapped in a relatively close area. Further, in abating the defect it took the operator about a minute to remove the wire. That length of time indicates this was more than a mere loose wrap of wire.

Further, I am not persuaded by Homestake's evidence. On the merits of the case I note that Isaac was not present with the inspection team and he did not know how the wire was wrapped around the equipment (Tr. 375).

I further reject Isaac's opinion that the hand held fire extinguisher equipment was adequate (Tr. 378, 379). Once Homestake installed the automatic equipment it was bound to maintain the equipment without defects that affect the safety of the miners.

On the record, I find a violation of § 57.9-2 and this citation should be affirmed.

Citation 2097868

This citation alleges respondent violated 30 C.F.R. § 57.11-12 and a civil penalty of $20 is proposed.

At the hearing the Secretary moved to vacate his citation.

Pursuant to Commission Rule 11, 29 C.F.R. § 2700.11, the motion to vacate was granted.

Citation 2097872

This citation alleges a violation of 30 C.F.R. § 57.11-2 and a civil penalty of $20 is proposed.

At the hearing the respondent moved to withdraw its notice of contest.

Pursuant to Commission Rule 11, 29 C.F.R. § 2700.11, the motion to withdraw was granted.

Citation 2097938

This citation alleges a violation of 30 C.F.R. § 57.19-126 and proposes a civil penalty of $329.

The cited standard provides as follows:

> 57.19-126. Hoist ropes shall be examined over the entire active length at least every month to evaluate wear and possible damage. When such examinations or other in-

spections reveal that the rope is worn, and at least every six months, caliper measurements or non-destructive tests shall be made at the following locations:

a. Wherever wear is evident;
b. Immediately above the socket or clip and above the safety connection;
c. Where the rope rests on the sheaves;
d. Where the ropes leave the drums when the conveyances are at the regular stopping point;
e. Where a layer of rope begins to overlap another layer on the drum;
and
f. At 100 feet intervals (measurements shall be made midway between the last previously calipered points).

Summary of the Evidence

MSHA inspector Iver Iverson issued this citation on September 13, 1983 when he found that no entries had been made in the 52 man cage hoist log book for the 1700 level. Corrective measurements and entries thereof should have been made six months after May 4, 1982. In addition, the record book did not show any caliper measurements or non-destruct tests (Tr. 397-401). The condition was abated by Homestake cutting the elevator rope and making entries in its log book (Tr. 398).

On May 4, 1982, the inspector had recommended that corrective measures be taken and this condition was forcefully brought to the attention of the operator when he wrote a 103(k) order. The inspector felt the company's negligence in this situation was high because no corrective action had been taken. In addition, if the rope failed and the conveyance fell the condition could result in a fatality (Tr. 400; Exhibit P16, P17).

In reviewing the log books from May 4, 1982 the inspector saw an entry that a Rotesco test had been made on March 1, 1983. This was ten months after the 103(k) order. The regulation requires testing every six months (Tr. 401, 402).

The members of the rope crew told the inspector that they hadn't noticed the damaged area on the hoist ropes. In addition, they hadn't taken measurements at the sheave wheel (Tr. 404-406).

The inspector agreed that a Rotesco test is acceptable. If such a non-destructive test is made it complies with the regulation (Tr. 415, 416).

Elmer Sorensen and Michael F. Johnson testified for Homestake. Sorensen, the rope repair foreman, testified that the service rise at the 52 cage, 1700 level, is checked once a week. The ropes are measured monthly with calipers (Tr. 441, 442).

In May 1982, upon receiving the first citation, Sorensen measured and found that the rope was 1/32 oversize at the crossover point (Tr. 445). The records reflect that the calibrations made on the 52 crossover cage are within the limits set by the regulations (Tr. 446, 447).

The members of the rope crew know their jobs (Tr. 448). Employees record the rope information in the log books (Tr. 452).

Michael F. Johnson, a Homestake mechanical engineer, tested this particular rise twice a year with Rotesco equipment. The Rotesco machine tests the rope for loss of metallic area (Tr. 468). Johnson performed Rotesco tests on the following dates:

March 16, 1982
October 20, 1982
March 4, 1983
September 16, 1983
October 20, 1983
March 15, 1984
September 14, 1984

(Tr. 472, 473, 478, 479).

In cross-examination, Johnson admitted that when he tests the equipment he documents it in the log book. However, he did not know why the October 20, 1983 test had not been entered in the book (Tr. 478, 479).

Johnson routinely gives his test results to department head Pontius. Inspector Iverson had been given a copy of the test dated March 4, 1983. Further, Pontius told the inspector that he couldn't produce any records but he said he'd produce them. The inspector indicated he would vacate the citation if the record was produced. Johnson had no idea why Iverson was not furnished with a copy of the results of October 20, 1982.

Witness Johnson explained at length how the Rotesco test is accomplished (Tr. 489-496).

In Johnson's opinion the rope could appear worn but still be within the perimeters of the regulation (Tr. 496, 497). From March 16, 1982 through September 14, 1984 the rope didn't warrant any change (Tr. 498).

Discussion

The thrust of the Secretary's case focuses on the proposition that Homestake failed to test its hoist ropes within six months after a defective rope condition was found on May 4, 1982.

The Secretary's case is based essentially on the inspector's testimony that the hoist log book failed to record the required

inspection. On the other hand, Homestake's witnesses claim a non-destructive Rotesco test was done within six months of May 4, 1982.

On the credibility issues concerning this citation I generally credit Homestake's witnesses Sorensen and Johnson. I was particularly impressed with the expertise of these individuals. Johnson, who performs the Rotesco tests on the hoist, testified that he ran the tests on October 20, 1982 (Tr. 472). I reject the Secretary's evidence because, as discussed hereafter, it is confusing and inarticulate.

The Secretary basically centers his argument on the credibility aspects of the evidence. He contends his case should prevail for a number of reasons. Initially, it is argued the inspector thoroughly examined the wire rope (Tr. 404, 414). In addition, he examined the log book and found no entry. Further, the rope crew stated that the rope was worn and defective. Finally, Homestake had an opportunity to produce the records to avoid the issuance of this citation but it failed to do so.

I am not persuaded by the Secretary's arguments. The basic difficulty is that Inspector Iverson testified concerning an inspection on May 4, 1982 (Tr. 399-402); on August 24, 1983 (Tr. 405, 406, 413, 141); and when this citation was issued on September 13, 1983 (Tr. 406).

It is true that the evidence the Secretary relies on is in the record but a careful reading of the transcript indicates that the proferred evidence is not directly connected to the instant citation. In the absence of such a nexus the evidence cannot be held supportive of the Secretary's case.

It is true that the test in question had not be recorded in the Homestake log book. But, as previously stated, I find Homestake's testimonial evidence persuasive on this issue.

Evidentiary Ruling

An evidentiary ruling arose in this case concerning the application of the informant's privilege. The judge declined to extend the privilege so as to protect the identity of the members of the Homestake rope crew who had made statements to the inspector (Tr. 421-434).

This case was heard in October, 1984. Subsequently, the Commission articulated the scope of the informant's privilege in Secretary on Behalf of Logan v. Bright Coal Company, Inc., 6 FMSHRC 2520 (November 1984). The members of the rope crew did not testify in this case and the judge's evidentiary ruling would not affect the ultimate decision concerning this citation.

For the foregoing reasons this citation should be vacated.

Citation 2097942

This citation alleges respondent violated 30 C.F.R. § 57.11-6 which provides:

> 57.11-6 Mandatory. Fixed ladders shall project at least 3 feet above landings, or substantial handholds shall be provided above the landings.

Summary of the Evidence

MSHA Inspector Iver Iverson issued this citation when he found a ladder in the 6200 borehole was not extended three feet above the top landing. In addition, there were no substantial handholds. An employee could fall 120 feet if he fell into the borehole (Tr. 514-516).

The inspector considered the gravity of this violation to be high; a fatality was likely to occur if a worker fell 120 feet (Tr. 516; Exhibit P18, P19).

At the time of the inspection there were miners down the raise as well as miners working on the concrete pad (Tr. 520).

The workers told the inspector that extenders on the ladder would be in the way. Extenders are mounted by attaching them to the ladder with 1/2 inch bolts (Tr. 524, 525).

Homestake's evidence indicates that on the date of this inspection Leonard Feterl was on the surface at the 6200 borehole. He was lowering material by means of a cable attached to a tugger to his partner/son (Tr. 525-538).

There was just about five feet of room around the area. Only Feterl and his son worked at this borehole until it was completed (Tr. 541). When the borehole is finished the men would put on ladder extenders. If it is not completed after a given day's work they would block the area with a cable and post a "keep out" sign. No one enters the borehole until it is finished (Tr. 543).

The working procedure is for one of the miners to lower himself into the hole with a safety rope. The worker on the surface would then withdraw the rope. The two men alternate their respective positions every four hours (Tr. 541, 542). When it is time for a worker in the borehole to come out his partner drops him the rope. He uses it to pull himself out (Tr. 544).

Feterl and his shift boss, Johnny Smith, both expressed the view that the extenders are hazardous and cause problems. These arise because it is necessary to guide the loads around the extenders in a narrow five foot space (Tr. 539, 566-572). After the citation was issued the extenders were placed back on the

ladders. The men worked four additional hours to finish the job (Tr. 563, 564).

Discussion

A credibility issue arises concerning whether workers were using the ladder to enter and leave the borehole. On this issue I credit Homestake's evidence. Inspector Iverson, in his direct examination, stated employees were mounting and dismounting the ladder during the working shift. However, in cross examination, he admitted they were doing some type of construction work at the borehole (Tr. 526). Further, the inspector agreed that he failed to observe any workers going up and down the borehole at the time of the inspection (Tr. 528).

Homestake's evidence to the contrary is more persuasive (Tr. 540). In my view the men doing the construction at the borehole would know if other workers were using the ladder.

The purpose of § 57.11-6 is two-fold. It requires fixed ladders or handholds for workers entering and the borehole. In this factual setting no workers were using the landing as contemplated by the regulation. It is uncontroverted that the borehole was in a construction mode. It follows that the Secretary's application of the regulation seeking to require fixed ladders is beyond the purview of the regulation. In addition, as indicated hereafter, the borehole did not constitute a travelway.

However, the Secretary's allegations and proof establish a factual basis that the borehole landing lacked substantial handholds.

However, as noted in Homestake's post-trial brief, § 57.11-1 through § 57.11-41 falls generally under the subtitle of "Travelways". The definition section states that a "travelway" means a passage, walk or way regularly used and designated for persons to go from one place to another, § 57.2.

In this scenario this borehole was not a travelway because it was under construction and roped off. It was also signed at quitting time. Cf Homestake Mining Company, 2 FMSHRC 493 (1980).

For these reasons Citation 2097942 should be vacated.

Civil Penalties

The statutory criteria for assessing civil penalties are contained in 30 U.S.C. § 820(i) of the Act.

Citation 2097665 is to be affirmed. The negligence and the gravity in connection with this citation is high. The open and

obvious condition virtually eliminated the fire suppression device on this equipment.

In considering these factors and in view of the stipulation of the parties I deem that the proposed penalty of $206 for this citation should be affirmed.

The proposed penalty of $20 agreed to by the parties in connection with Citation 2097872 is proper and should be affirmed.

Briefs

Counsel for both parties have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Citations 2097664, 2907868, 2907938 and 2097942 should be vacated.

3. Citations 2097665 and 2097872 should be affirmed.

Distribution:

Eliehue C. Brunson, Esq., Office of the Solicitor, U.S. Department of Labor, 911 Walnut Street, Room 2106, Kansas City, Missouri 64016 (Certified Mail)

Robert A. Amundson, Esq., Amundson and Fuller, 215 West Main, Lead, South Dakota 57754 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 83-15-M A.C. No. 39-00055-05503
v.	:	Homestake Mine
HOMESTAKE MINING COMPANY, Respondent	:	

DECISION

Appearances: Eliehue C. Brunson, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Petitioner;
Robert A. Amundson, Esq., Amundson & Fuller, Lead, South Dakota, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating a safety regulation promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits commenced on October 30, 1984, in Rapid City, South Dakota.

The parties filed post-trial briefs.

Issues

The issues are whether respondent violated the regulation; if so, what penalty is appropriate.

Stipulation

At the commencement of the hearing the parties stipulated as follows:

Respondent is subject to the Act and operates a gold mine in Lead, South Dakota. Respondent's products enter interstate commerce. The proposed penalty based upon the assessment, would not have detrimental effect on the company's operation. In addition, the citation that is in issue here was properly delivered to the company during the course of an inspection.

Citation 2097733

This citation alleges respondent violated 30 C.F.R. § 57.14-55, which provides:

> Welding operations shall be shielded and well-ventilated.

Summary of the Evidence

MSHA Inspector Iver Iverson issued this citation when he observed that a welding shield was not being used during welding operations at the 8,000 foot level (Tr. 16-19, 24; Exhibit P1, P2, P3).

A welder and his helper were welding rebar at the pump station. A welding shield can be a canvas curtain placed on a small framework. Such a shield is positioned so other persons in the area will not be exposed to the direct rays of the welding arc of the electrode (Tr. 24).

At the time of the issuance of this citation the welder himself was wearing a welder's hood and the helper was wearing safety glasses (Tr. 28, 29).

The inspector agreed that the welder's helper was probably trained not to look at the arc when the welding is being done. The inspector issued the citation because Homestake failed to provide a shield between the helper and the welder (Tr. 32, 33, 46).

In this particular work situation the helper would pickup the rebar, walk to the wall, and hold it in place while the welder struck an arc and welded the rebar. It takes about 30 seconds to tack the rebar (Tr. 38, 64, 65). The inspector considered this to be a poor working procedure because the helper was exposed to arc and slag burn (Tr. 39).

Homestake abated this citation by installing a canvas curtain which was moved as the work progressed (Tr. 43, 44).

Witness Jim Mattson, Homestake's general shop foreman, indicated that it is standard procedure for the helper to position materials to be welded, particularly, if they are heavy (Tr. 46, 48). In this situation the welder would instruct his helper where he'd like the rebar held. He also lets the helper know when he is prepared to strike an arc. The helper can then turn away. He is trained and thereby shields his eyes from the welding arc (Tr. 50, 52).

Inside Homestake's welding shop shields are used to protect the 20 to 30 workers in the area (Tr. 55).

Witness Mattson differs with the inspector's opinion over whether a hazard exists from illumination when the helper has turned and walks away from the welding arc (Tr. 62, 63).

Mine superintendent Jerry Pontius testified that it was not practical to have a shield between the welder and his helper. Any shield would prevent the helper from observing if he was holding the rebar correctly (Tr. 68-71).

Illumination and reflected rays are not a problem because any hazard to the eyes occurs only when detrimental rays go directly from the arc to the retina of the eye. A similar arc is used in movie theatres to project images onto the screen. Persons watching movies are not injured by the reflected rays (Tr. 72).

Pontius has never had an occurrence when a welder's helper was blinded by the rays of a welding arc. However, a condition known as "sandy eyes" can occur if a welder or his helper is "flashed" by the arc (Tr. 74, 77, 79, 83, 86). Such a condition occurs if the welder begins welding before pulling down his hood (Tr. 79). In this particular work situation clamps could have been used to hold the material in place (Tr. 103).

The use of a welding shield, such as in the shop, is a well established procedure to shield workers in close proximity to the welding arc (Tr. 82).

Discussion

The basic facts are essentially uncontroverted. They establish that respondent failed to shield its welding operations in the 8,000 foot level of its mine.

Respondent's post-trial brief asserts that there is no definition in 30 C.F.R. § 50.2 as to what constitutes a shield and the regulation itself does not specifically require an operator to shield a worker from the area where the worker is performing his job. Therefore, it is argued that no violation occurred.

Respondent's arguments lack merit. Homestake's witness indicated that shielding from a welding operation is a well known procedure (Tr. 82).

Respondent also contends that upholding this citation would require it to comply with a requirement which is not set forth in the regulation. Therefore, such a construction would violate the requirement that fair warning be given of what is required for compliance citing National Industrial Sand Assoc. v. Marshall, 601 F.2d 689, 704 (3rd Cir. 1979) and McCormick Sand Corp., 2 FMSHRC 21 (1980).

I disagree. The standard merely requires that the welding operation be shielded. The operator can choose the method of abatement. In this particular situation the rebar could have been attached with clamps, thereby eliminating the need for the helper to be in close proximity to the welding procedure. National Industrial Sand Assoc. v. Marshall is not inopposite this view.

McCormick Sand Corp. involved an electrical regulation, 30 C.F.R. § 56.12-25. In that case Commission Judge Franklin P. Michels refused to support MSHA's view that the "ground" had to be continuous. He noted that McCormick Sand had provided a ground. It followed that the Secretary could not, without more, require a particular type of ground. Simply stated, McCormick Sand Corp. does not factually support Homestake's argument. There is no evidence here that this welding operation was shielded in any manner.

Homestake further argues that compliance with the regulation, as interpreted by the inspector, would in essence reduce miner safety citing Sewell Coal Company, 5 FMSHRC 2026 (1983) and National Independent Coal Operations Association v. Norton, 494 F.2d 987 (D.C. Cir., 1974), Aff'd, 423 U.S. 388 (1975).

The cited cases do not support Homestake's argument. Sewell Coal Company establishes the principal that an operator may argue diminution of safety as a defense to the Secretary's allegation of a violation and request for imposition of a penalty under the following circumstances: (1) the operator petitioned for the modification of a standard and was subsequently cited for violating the standard; (2) the Secretary granted the modification but nonetheless continued the enforcement proceedings; and (3) the material circumstances encompassing the modification and the enforcement proceedings are identical, 5 FMSHRC at 2030. It is apparent that the defense of diminution of safety is not available to respondent here since there is no evidence that the respondent ever sought a modification of § 57.14-55.

National Independent Coal Operators Association is not controlling as it involves an overview of the Act as it relates to the imposition of penalties.

Homestake has failed to present a defense to the Secretary's evidence. Accordingly, this citation should be affirmed.

Civil Penalty

The statutory criteria for assessing a civil penalty are contained in 30 U.S.C. § 820(i) of the Act.

Citation 2097733 is to be affirmed. The proposed penalty of $20 appears to be in order, particularly in view of the stipulation of the parties.

Briefs

The Counsel for both parties have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are entered:

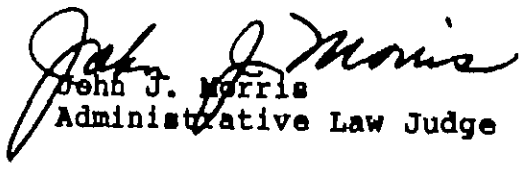
1. The Commission has jurisdiction to decide this case.

2. Citation 2097733 and the proposed penalty should be affirmed.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

Citation 2097733 and the proposed penalty of $20 are affirmed.



John J. Morris
Administrative Law Judge

Distribution:

Eliehue C. Brunson, Esq., Office of the Solicitor, U.S. Department of Labor, 911 Walnut Street, Room 2106, Kansas City, MO 64106 (Certified Mail)

Robert A. Amundson, Esq., Amundson & Fuller, 215 West Main, Lead, South Dakota 57754 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 83-21-M A.C. No. 39-00055-05505
v.	:	Homestake Mine
HOMESTAKE MINING COMPANY, Respondent	:	

DECISION

Appearances: Eliehue C. Brunson, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Petitioner;
Robert A. Amundson, Esq., Amundson & Fuller, Lead, South Dakota, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating three safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits commenced on October 30, 1984, in Rapid City, South Dakota.

The parties filed post-trial briefs.

Issues

The issues are whether respondent violated the regulations; if so, what penalties are appropriate.

Citation 2097201

This citation alleges respondent violated 30 C.F.R. § 57.3-22, which provides as follows:

> 57.3-22 Mandatory. Miners shall examine and test the back, face, and ribs of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground

control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

Stipulation

At the commencement of the hearing the parties stipulated as follows:

Respondent is subject to the Act and operates a gold mine in Lead, South Dakota. Respondent's products enter interstate commerce. The proposed penalties, based upon the assessments, would not have a detrimental effect on the company's operation. In addition, the citations that are in issue here were properly delivered to the company during the course of an inspection.

Summary of the Evidence

Federal inspector Wayne Lundstrom, a person experienced in mining, issued this citation. The company was cited because its miners were working under loose ground (Tr. 108-113). The inspector considered the negligence and gravity of the violation to be high. The loose could strike the miners and cause disabling injuries (Tr. 115-117).

The inspection team consisted of the inspector as well as Ed Wiedenmeyer and Richard Frybarger. As the three men entered the stope, the inspector stepped off of the ladder and noticed a water as well as an air hose 10 to 20 feet from the ladder. He walked out six to seven feet and saw that the back had not been bolted (Tr. 118). When he first saw the two miners in the stope he observed that they were under supported ground. However, the inspector indicated that his notes reflect that the workers were working under an unscaled area (Tr. 123, 139). The inspector also saw 50 to 80 feet of air and water hoses under the loose area. The miners stated they had thrown the hoses out under the loose (Tr. 124, 129). The inspector disputed their claim; he felt that the hoses could not have been thrown that distance and could only have been dragged into that position. Inspector Lundstrom also saw a grub hoe and drill steel under the loose (Tr. 125, 126). The hoses themselves attached to a jackleg which was under secured ground (Tr. 142, 143). The inspector agreed that the miners could have been roof bolting from under secured ground (Tr. 142-144).

Richard L. Frybarger, a member of the inspection team, entered the stope at the 5150 foot level (Tr. 154). The two miners he observed were under secured ground (Tr. 157, 160).

The inspector walked about 50 feet, beyond where the roof had been bolted. Schultz, normally Frybarger's partner in the stope, warned the inspector about the loose (Tr. 160).

Ten to fifteen feet of hose had looped under the loose ground area. Schultz indicated he had flipped it out there (Tr. 161). Frybarger believed he could have done that (Tr. 162, 163). Frybarger didn't agree with the allegations in the citation but he didn't want to argue about it (Tr. 164).

Contract miners, such as Schultz, are responsible for their own hoses (Tr. 168).

Frybarger felt there was no violation because the miners had not been working under the loose.

Edgar Wiedenmeyer, Homestake's shift boss, testified that when they entered the stope the miners were bolting the roof (Tr. 188-190). There were no miners under the unsupported roof. But about 15 to 20 feet of air hose and water hose were under the unsupported roof (Tr. 190, 191, 193, 201, 202). Schultz said he had flipped the hose out there (Tr. 191). It definitely didn't look like there was 50 to 80 feet of hose under the loose (Tr. 192).

The inspector was warned by the miners when he went out under the loose (Tr. 192, 193).

Wiedenmeyer agreed that the inspector was in a better position than he and Frybarger to see any tools under the loose area (Tr. 205).

Discussion

This case presents certain credibility issues.

At the outset: it is clear that no witness, including Inspector Lundstrom, observed the miners working under the unsupported roof, which is commonly called "loose". The inspector was emphatic that the miners were not under the unsupported area (Tr. 122). His notes of the inspection reflect to the contrary. But such a conclusion, in my opinion, is based on the position of the hoses in the area.

We have thus arrived at the pivitol portion of the case. Did the miners place the hoses under the unsupported area or were the hoses merely flipped out into that area.

On this issue the evidence is conflicting. The inspector indicated he saw about 50 to 80 feet of hose under the loose. If so, I conclude that it must necessarily have been placed in that position by the stope miners. At the time of the inspection the inspector refused to accept the miners' explanations. He stated it was not possible to 'throw" that much hose.

I credit the inspector's version for several reasons. He was emphatic that there was 50 to 80 feet of hose under the loose. In addition, he saw a grub hoe and drill steel under the loose. Homestake's witness Wiedenmeyer agreed the inspector was in a better position than Homestake's witnesses to see the grub hoe and the drill steel (Tr. 206, 207).

Finally, I am unwilling to discredit the inspector's conclusions. He testified that in his opinion the miners must have carried the hoses under the loose. On the other hand, Schultz, the stope miner, did not testify at the hearing although he was still in Homestake's employ at that time (Tr. 212, 213).

Homestake, in its post-trial brief, contends that the petitioner cannot prevail because there was no immediate threat to miners since they were not working under the loose, but were securing the area.

It is true that the miners were not observed under the loose. But the thrust of the Secretary's case establishes that the hoses, grub hoe, and drill steel were under the loose. Further, they could only have been placed there by the miners in the stope. For the reasons stated in the analysis of the evidence I find the petitioner's evidence to be credible.

It follows that ASARCO, Incorporated, 2 FMSHRC 920 (1980), relied on by Homestake, is not factually compatible with the instant case.

Homestake further argues that the citation was based on the inspector's erroneous assumption that the miners performed work under the loose. Homestake contends that this circumstantial evidence is wholly insufficient to establish a violation. The operator relies on Ozark Lead Company, 4 FMSHRC 29 (1982); Energy Fuels Nuclear, Inc., 5 FMSHRC 1878 (1983), and National Independent Coal Operators Association v. Morton, 494 F.2d 987 (D.C. Cir., 1974), aff'd 423 U.S. 388 (1975).

The cases cited by Homestake are not persuasive. In Ozark Lead Company, there was no credible evidence that the miners were exposed to the loose material. Obviously, this is not the situation presented on this record. ASARCO, Incorporated would require the judge to adopt the operator's defense. However, I have specifically rejected such a finding for the reasons already stated. National Independent Coal Operators Association involves an overview of certain procedural aspects of the Act. Hence, it is not controlling authority in this case.

For the reasons stated herein, Citation 2097201 should be affirmed.

Civil Penalties

The statutory criteria for assessing civil penalties are contained in 30 U.S.C. § 820(i) of the Act.

In connection with this citation I find that the negligence and gravity are relatively high.

In considering these factors and in view of the stipulation of the parties, I deem that the proposed penalty of $157 for the violation of § 57.3-22 is proper and it should be affirmed.

Briefs

The Counsel for both parties have filed detailed briefs which have been most helpful in analysing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Citation 2097303

This citation alleges respondent violated 30 C.F.R. § 57.11-12 and a civil penalty of $20 is proposed.

At the hearing the Secretary moved to vacate this citation.

Pursuant to Commission Rule 11, 29 C.F.R. § 2700.11, the motion to vacate is granted.

Citation 2097610

This citation alleges respondent violated 30 C.F.R. § 58.19-100 and a civil penalty of $20 is proposed.

At the hearing the Secretary moved to vacate this citation.

Pursuant to Commission Rule 11, 29 C.F.R. § 2700.11, the motion to vacate is granted.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Respondent violated 30 C.F.R. § 57.3-22; accordingly, Citation No. 2097201 should be affirmed and a penalty of $157 should be assessed.

3. Citation Nos. 2097303 and 2097610 should be vacated.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

1. Citation No. 2097201 is affirmed and a penalty of $157 is assessed.

2. Citation No. 2097303 and all penalties therefor are vacated.

3. Citation No. 2097610 and all penalties therefor are vacated.

John J. Morris
Administrative Law Judge

Distribution:

Elichue C. Brunson, Esq., Office of the Solicitor, U.S. Department of Labor, 911 Walnut Street, Room 2106, Kansas City, Missouri 64016 (Certified Mail)

Robert A. Amundson, Esq., Amundson & Fuller, 215 W. Main, Lead, South Dakota 57754 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 83-30-M A.C. No. 39-00055-05506
v.	:	Homestake Mine
HOMESTAKE MINING COMPANY, Respondent	:	

DECISION

Appearances: Eliehue C. Brunson, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Petitioner;
Robert A. Amundson, Esq., Amundson & Fuller, Lead, South Dakota, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating two safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties, a hearing on the merits commenced on October 30, 1984, in Rapid City, South Dakota.

The parties filed post-trial briefs.

Issues

The issues are whether respondent violated the regulations; if so, what penalties are appropriate.

Citation 209

This citation alleges respondent
§ 57.11-2.

At the hearing respondent moved
contest and to pay the proposed pen

Pursuant to Commission Rule 11,
motion was granted. The final order
entered during the hearing.

Citation 2097749

This citation alleges respondent violated 30 C.F.R. § 57.12-19, which provides as follows:

> 57.12-19 Mandatory. Where access is necessary, suitable clearance shall be provided at stationary electrical equipment or switchgear.

Stipulation

At the commencement of the hearing the parties stipulated as follows:

Respondent is subject to the Act and operates a gold mine in Lead, South Dakota. Respondent's products enter interstate commerce. Further, the proposed penalties, based upon the assessments, would not have a detrimental effect on the company's operation. In addition, the citations that are in issue here were properly delivered to the company during the course of an inspection.

Summary of the Evidence

At the 4850 level, in the Ross electrical substation, MSHA Inspector Iver A. Iverson found that the area where two 2300/480 A.G. volt transformer banks were installed lacked adequate clearance. Further, the confined space constituted a hazard to employees (Tr. 267-268).

In this substation every employee operating the insulating switch was forced to hold the hot stick over the transformer bank. When closing or opening the switch the worker would be standing against live 480 volt (insulated) conductors and the transformer case (Tr. 227). The normal position to operate the oil circuit disconnect could not be obtained due to the restricted space between the insulated conductors, the transformer case and the oil circuit enclosure switch (Tr. 227).

The distance between the transformer bank conductor and the switch enclosure frame was 28 inches. The transformers were approximately 52 inches high (Tr. 227, 267). A person had to reach over the top of the transformer and a live conductor to reach the equipment (Tr. 228). The placement of the transformer banks did not provide a suitable and safe working clearance to safeguard against employees. The employees could be fatally injured by a high voltage electrical shock when making bodily contact with the live electrical energized components (Tr. 228; Exhibits P4 through P9).

MSHA's regulation requires "suitable clearance" but does not define it. MSHA uses a table of working clearances taken from the NEC, (National Electrical Code, Section 110-16) (Tr. 243-245).

The NEC guide for suitable clearances takes into consideration the voltages involved. There are different conditions but from zero to 150 volts the minimum clearance is three feet. From 150 to 600 volts the distance is a minimum of three feet with listed exceptions and qualifications.

On cross examination Inspector Iverson agreed that Article 9 of the NEC provides that the code does not apply to "underground mines" (Tr. 244, 257-259).

Clarence F. Bender, Homestake's electrical foreman, testified for Homestake and he indicated that the condition in the distribution substation was temporary. In Bender's opinion electricians could safely work in the area when disconnecting the circuit breakers (Tr. 273-275, 282-284, 292, Exhibit B).

Iverson didn't tell the company what he believed constituted a suitable clearance but Bender assumed Iverson was relying on the National Electrical Code, a recognized authority (Tr. 285).

Bender stated that all of the conductors in the area were insulated. Even if an electrician's pouch touched the transformer nothing would happen because of the insulation. However, if the integrity of the insulation wrapping disintegrates then a worker would be subject to electrocution (Tr. 286).

Witness Kermit Kidner, an electrical maintenance engineer for the company, testified that a severe motion is not required to open or close the circuit breakers. A hot stick is used to pull the disconnect. In his opinion there is suitable clearance to do the work to be performed by qualified personnel in the substation. At this location there was no other space available to place this equipment (Tr. 303-318).

Discussion

This case presents a basic credibility conflict between MSHA's Inspector Iverson and respondent's witnesses Bender and Kidner.

I credit MSHA's evidence and I conclude that respondent violated the regulation. There was not "suitable clearance" provided in the substation. The summary of the evidence basically outlines the violation. In sum, the miners were closing

and opening isolating switches and circuit breakers within a space as narrow as 28 inches (Tr. 265, 267). It is necessary to stand in front of the equipment to perform these acts. Inspector Iverson, who had been a licensed electrician in the State of Arizona, was qualified to render his opinion on this subject (Tr. 268). I accept his opinion and reject Homestake's contrary evidence.

In its post-trial brief Homestake argues that MSHA cannot rely on the National Electrical Code to establish a violation. I agree. The NEC merely supports Inspector Iverson's opinion. I do not consider that the NEC, in and of itself, establishes this violation.

In support of its position that the NEC is not enforceable per se Homestake cites Massey Sand and Rock Co., 1 FMSHRC 545 (June 1979); Peabody Coal Company, 1 MSHC 2071 (March 1979) and Shamrock Coal Company, 1 FMSHRC 1973 (December 1979).

The cited cases hold that interpretative bulletins and other MSHA memoranda do not have the force and effect of a regulation. I agree that the National Electrical Code falls within the same category. But to reiterate: this case turns on the testimony of the expert witness and not on the NEC. The cases relied on by respondent are, accordingly, not persuasive authority.

Civil Penalties

The statutory criteria for assessing civil penalties are contained in 30 U.S.C. § 820(i) of the Act.

The penalty proposed in the settlement of Citation 2097609 is proper and it should be affirmed.

Considering the statutory criteria in connection with Citation 2097749 it appears that the gravity of the violation is relatively high. Miners were exposed to the possibility of electrocution. Homestake's negligence is likewise apparent since the company installed the equipment in this substation.

In view of these factors and in considering the stipulation of the parties I deem that the proposed penalty of $241 for Citation 2097749 is proper and should be affirmed.

Briefs

The Solicitor and Homestake's counsel have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. The proposed settlement of Citation 2097609 is proper and it should be approved.

3. Respondent violated 30 C.F.R. § 57.12-19 and Citation 2097749 should be affirmed together with the proposed penalty of $241.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

1. Citation 2097609 and the proposed penalty of $20 are affirmed.

2. Citation 2097749 and the proposed penalty of $241 are affirmed.

John J. Morris
Administrative Law Judge

Distribution:

Eliehue C. Brunson, Esq., Office of the Solicitor, U.S. Department of Labor, 911 Walnut Street, Room 2106, Kansas City, Missouri 64106 (Certified Mail)

Robert A. Amundson, Esq., Amundson & Fuller, 215 W. Main, Lead, South Dakota 57754 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 7, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 85-11-M A. C. No. 16-00033-05510
v.	:	
BIG RIVER INDUSTRIES, INC., Respondent	:	Big River Industries, Inc.

DECISION

Appearances: Allen Reid Tilson, Esq., Office of the Solicitor U.S. Department of Labor, Dallas, Texas, for Petitioner;
Kirby Bergeron, Big River Industries, Erwinville, Louisiana, for Respondent.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed under section 110 of the Act by the Secretary against the operator on December 24, 1984. A hearing was held on September 11, 1985.

The subject citation which cites violations of both 30 C.F.R. § 56.5-1(a) and 30 C.F.R. 56.5-5 reads as follows:

> The "Burner Man" (Kiln Operator), located on the kiln floor of the surface plant, was exposed to a shift weighted average (SWA) of 1.63 mg/m^3 of respirable silica bearing dust on June 27, 1984. The TLV (Permissible Limit) was 1.34 mg/m^3.
>
> The employee was not wearing an MSHA approved respirator. An air-conditioned control booth was provided for the kiln operator. The analytical results were determined and this citation was issued on July 23, 1984. This termination due date is for providing an approved dust respirator and institution of a personal protection program and will be extended for the establishment of engineering or administrative controls when the personal protection program is instituted.

30 C.F.R. § 56.5-1(a) provides in pertinent part as follows:

(a) Except as provided in paragraph (b), the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54, which are hereby incorporated by reference and made a part hereof.

* * *

30 C.F.R. § 56.5-5 provides in pertinent part as follows:

56.5-5 Mandatory. Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. Whenever respiratory protective equipment is used a program for selection, maintenance, training, fitting, supervision, cleaning, and use shall meet the following minimum requirements:

(a) Mine Safety and Health Administration approved respirators which are applicable and suitable for the purpose intended shall be furnished, and employees shall use the protective equipment in accordance with training and instruction.

* * *

At the hearing the parties agreed to the following stipulations:

(1) the operator is the owner and operator of the subject mine;

(2) the operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977;

(3) the administrative law judge has jurisdiction of this case;

(4) the inspector who issued the subject citation was a duly authorized representative of the Secretary;

(5) a true and correct copy of the subject citation was properly served upon the operator;

(6) imposition of a penalty will not affect the operator's ability to continue in business;

(7) the alleged violation was abated in good faith;

(8) the operator's prior history of violations is good and it has no prior health violations;

(9) the operator's size is medium;

(10) this citation is the only time the operator has ever been cited for an excessive respirable dust violation (Tr. 16).

At the hearing an MSHA official testified that he was custodian of the dust records in this case and he identified the reports showing the cited excessive level of silica dust. The chain of custody for these documents was outlined (Tr. 7-8). Next, the inspector who issued the citation described the circumstances set forth in the citation (Tr. 12, 15). Finally, a MSHA expert explained how the tests for excessive silica are performed (Tr. 17-23). The operator declined to cross-examine any of MSHA's witnesses and offered no evidence of its own (Tr. 9, 16, 23). On the contrary, at the end of MHSA's case the operator stated that it did not contest the finding of excessive dust levels (Tr. 24). Nor did the operator disagree with the inspector's finding that the kiln operator exposed to the dust was not wearing an approved respirator (Tr. 27).

In light of the foregoing, the subject citation must be sustained. Indeed, in light of the position the operator took at the hearing, the Solicitor did far more than he had to in order to sustain the citation. Cf. 28 U.S.C.A. 1733(a) and Rule 803(8) of the Federal Rules of Evidence. However, since the case apparently was not amenable to settlement prior to hearing, the Solicitor acted responsibly in bringing his witnesses to the hearing. And he is to be commended for doing so.

The Solicitor agreed that the excessive silica dust level found here was an isolated instance. This rather unique circumstance distinguishes this case from others where the gravity of respirable dust violations has been considered. Therefore, I conclude it was of minimal gravity although the operator was negligent.

The failure of the kiln operator to wear an MSHA approved respirator was serious, although here again, because excessive levels occurred only once the level of gravity is not great. The operator was negligent but negligence is reduced somewhat because the approved respirator was on order and the kiln operator was wearing a respirator, although not an approved one.

After consideration of the foregoing and in light of the statutory criteria stipulated to, a penalty of $75 is assessed.

The operator is ORDERED TO PAY $75 within 30 days from the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Allen Reid Tilson, Esq., Office of the Solicitor, U. S. Department of Labor, 525 Griffin Square Building, Suite 501, Dallas, TX 75202 (Certified Mail)

Mr. Kirby Bergeron, Big River Industries, Inc., Highway 190, Erwinville, LA 70729 (Certified Mail)

Mr. W. H. Lane, President, Big River Industries, Inc., Highway 190, Erwinville, LA 70729 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-35 A.C. No. 24-01458-03502
v.	:	East Decker Mine
DECKER COAL COMPANY, Respondent	:	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
John S. McCaffrey, Esq., Decker Coal Company, Omaha, Nebraska, for Respondent.

Before: Judge Lasher

During the hearing in this matter in Sheridan, Wyoming, the parties conferred and reached (on the record) an amicable resolution of this matter calling for assessment of a $1.00 penalty and preserving the validity of the subject Section 104(d)(1) Citation in all its aspects including the special findings of "Unwarrantable Failure" and "Significant and Substantial".

The Settlement was consummated in the aftermath of unforeseen testimony and the resulting effects on the trial objectives of the parties. Pursuant to the settlement formula, the regulatory agency, MSHA, retains the values of its 104(d)(1) Citation as a foundation in the enforcement scheme of Section 104(d)(1) in return for which the Respondent is assessed what amounts to a token penalty.

In the premises, the settlement is found to be reasonable and proper and is approved.

ORDER

(1) Respondent, if it has not previously done so, shall pay the Secretary of Labor the sum of $1.00 within 30 days from the date hereof.

(2) Citation No. 2222731 dated November 7, 1984 is affirmed.

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

John S. McCaffrey, Esq., Decker Coal Company, 1000 Kiewit Plaza, Omaha, NE 68131 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF JEFF SLACK, Complainant,	:	DISCRIMINATION PROCEEDING Docket No. LAKE 85-79-D MSHA Case No. VINC CD 85-03 WNY No. 1 Mine
v.	:	
WHOLE NINE YARDS, CO., INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

After thorough negotiations, the parties have submitted a settlement agreement to pay $320 to the miner involved and to withdraw the petition for civil penalty. All parties, including the miner, Jeff Slack, are satisfied with the agreement. I find that the agreement meets the purposes of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

ORDER

WHEREFORE IT IS ORDERED that the parties' motion to approve settlement is GRANTED, and this proceeding is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn St., 8th Floor, Chicago, IL 60604 (Certified Mail)

Stuart W. Hyvonen, Esq., Blankenship and Associates, Inc., Vantage Centre, Suite 1400, 720 Executive Park Drive, Greenwood, IN 46142 (Certified Mail)

Mr. Jeff Slack, R.R. #1, Box 70, Brazil, IN 47834 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 85-92-M A.C. No. 10-00189-05502
v.	:	
	:	Star-Morning Unit
C. S. C. MINING COMPANY, Respondent	:	

DECISION

Appearances: Faye von Wrangel, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Axel Carlson, Safety Officer, C. S. C. Mining Company, Wallace, Idaho, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a civil penalty proposal filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for two alleged violations of certain mandatory safety standards promulgated pursuant to the Act. Respondent contested the proposed civil penalties, and pursuant to notice served on the parties, a hearing was held in Wallace, Idaho.

Issue

The issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed by the petitioner, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

Section 104(a) Citation No. 2085690, was issued on October 9, 1984. The inspector cited a violation of 30 C.F.R. § 57.5-37(a)(2), and the condition or practice cited is as follows: "This mine was sampled on October 4, 1984, and was found to be over exposed to Radon Daughters. The sample on the 1700 exhaust was 0.54 working level. Several employees were working in this mine."

Mandatory standard 30 C.F.R. § 57.5-37(a), provides as follows:

> (2) Where uranium is not mined--when radon daughter concentrations between 0.1 and 0.3 WL are found in an active working area, radon daughter concentration measurements representative of worker's breathing zone shall be determined at least every 3 months at random times until such time as the radon daughter concentrations in that area are below 0.1 WL, and annualy thereafter. If concentrations of radon daughters are found in excess of 0.3 WL in an active working area radon daughter concentrations thereafter shall be determined at least weekly in that working area until such time as the weekly determinations in that area have been 0.3 WL or less for 5 consecutive weeks.

Section 104(a) Citation No. 2393304, was issued on March 6, 1985. The inspector cited a violation of 30 C.F.R. § 57.3-22, and the condition or practice cited is as follows: "There was a loose slab approximately six feet by four feet by two feet approximately ten feet up on the left hand rib and the mucking machine operator was getting close to being directly beneath the slab."

Mandatory standard 30 C.F.R. § 57.3-22, provides as follows:

> Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

MSHA's Testimony and Evidence

MSHA Inspector Donald L. Myers testified that he has been an inspector for 11 years, and prior to that worked in the mining industry in Climax, Colorado, for 10-1/2 years. His experience includes timbering and stope mining of Molybdenum. He described the respondent's mining operation as a cut and fill stope lead and silver mine, and mining takes place at different levels or raises.

Mr. Myers stated that he first inspected the mine during the first week of October, 1984, and there were approximately 15 people working there. He was accompanied by Company Safety Director Charlene Reister, and Mr. Myers confirmed that he informed Ms. Reister that he was there to take a radon daughters sample of the mine exhaust air. He and Ms. Reister travelled to the exhaust entry and Mr. Myers took his sample approximately 20 feet inside the tunnel opening at a level drift at the 1700 level portal. At that time, men were working hauling timbers in and out of the portal with a diesel motor, but Mr. Myers did not determine the extent of the work being performed inside the mine. Mr. Myers observed no ventilation fans in operation, and he believed that "natural ventilation" was being used. A normal flow of air was being coursed from the old Star Mine

portal, up the shaft of the Star-Morning Unit, and through the 1700 level drift where he sampled.

Mr. Myers explained the procedures that he followed in taking his sample, and he identified the sampling pump as a Ludlum sampler. The sampler pumps two liters per minute, and he sampled for 5 minutes. He confirmed that he has received training in sampling procedures at MSHA's Mine Academy at Beckley, West Virginia, and also received on-the-job training in sampling procedures. He also confirmed that his sampling device is calibrated twice a year, that it was properly calibrated when he took his sample, and that he used the sampler battery as the power source for sampling. The sampling devices are maintained at his office, and they are available to the inspectors when they have a need to sample.

Mr. Myers stated that his initial sample reflected a 5 percent radon daughters exposure, that this was unusually high, and that it was the first time that he had ever registered a reading that high. He informed Ms. Reister that the mine either had a problem at the sample location or that his equipment was defective. In view of the high reading, Mr. Myers returned to the mine with MSHA technician Dick Sarginson from MSHA's Bellvue office, and they took additional samples.

Mr. Myers stated that when he and Mr. Sarginson returned to the mine, Ms. Reister was contacted again, and accompanied them during their sampling. A small, pre-determined sample was tested by his Ludlum sampling device in order to check the calibration, and the device checked out. He and Mr. Sarginson took samples at various locations in the mine on separate Ludlum sampling devices, and Mr. Myers identified exhibit C-1, as the results of their collective sampling. He indicated that the digital read-outs on their sampling devices were relatively similar, and he confirmed that any samples over .3 WL were out of compliance. Since it seemed obvious that the respondent had not conducted any monitoring or sampling of radon daughters exposure because they did not have the sampling equipment, Mr. Myers issued the citation in question and gave it to Ms. Reister and instructed her to give it to Mr. James Stricker, the company president. The 0.54 sample result of October 4, 1984, at the 1700 Level was the basis for the citation. Mr. Sarginson's sample result at that location was 0.55.

Mr. Myers stated that when he issued the citation, there were seven miners working in the mine, but he was not

sure what they were doing. He also indicated that radon daughters contamination is primarily one of "decaying action," and that adequate ventilation is the proper procedure for staying in compliance. He confirmed that no fans were being used at the time he sampled, and he indicated that the mines in the area are relatively low in radon daughters exposure. He also indicated that radon daughters exposure above the .3 WL level present lung cancer and radiation hazards.

Mr. Myers stated that approximately 3 weeks after the sampling with Mr. Sarginson, he took additional samples in the main exhaust and found that the 0.54 WL radon daughters exposure was reduced to 0.14 WL. He modified the citation on November 16, 1984, to reflect that sampling would have to be conducted every 3 months until the exposure was less than 0.1 WL in the exhaust air.

Mr. Myers confirmed that he modified the citation on July 29, 1985, to delete his "S & S" finding, and he did so on the ground that MSHA's district policy that any "working level months" (WLM) exposure not in excess of 4 WLM should not be considered "significant and substantial." Mr. Myers' initial "S & S" finding was based on his 5.0 initial sample result. A copy of his modification was produced by the respondent's representative, exhibit R-2, and it is a matter of record (Tr. 9-29).

On cross-examination, Mr. Myers stated that MSHA C. A. C., or "courtesy compliance visits" do not include radon daughters exposure sampling. He confirmed that he did not issue any citations when he initially took samples at the mine because he was not sure that his sampling device was working properly. He issued the citation in question only after verifying through the sampling made with Mr. Sarginson that his equipment was operating properly. He reiterated his testing procedures, explained the filter numbers which appear on exhibit C-1, and confirmed that he did not know what the men in the mine were actually working on while he was there.

Mr. Myers indicated that when he met with Ms. Reister at the mine during his inspections, she appeared to be well informed as to what was required to insure compliance with the radon daughters sampling requirements, and he confirmed that he conducted a "close-out conference" with her at the mine. He also indicated that he suggested to Ms. Reister that fans be used to enhance the exhaust ventilation.

Mr. Myers indicated that it was possible that his initial high radon daughters sampling readings may have been caused by radon exhausting from the old Star Mine workings. Although he confirmed that the sampling devices used by him and Mr. Sarginson were calibrated, he did not know when they were last calibrated. While he did not know the actual temperature on the days he sampled, he confirmed that it was cloudy and that there was snow on the ground. He confirmed that respondent's sketch of his radon daughters sampling results, exhibit R-1, was accurate (Tr. 29-51; 55-63).

MSHA Inspector Jim Rinaldi testified as to his experience and background, and he confirmed that he has 26 years' of hardrock multi-level mining experience similar in nature to the type of mining conducted by the respondent. He confirmed that he inspected the mine on March 6, 1985, and that Company Safety Director Mr. Axel Carlson, accompanied him, and that mine foreman James Stricker, Jr., was present when he issued the citation.

Mr. Rinaldi stated that mining had reached the 1100 level in a drift approximately 8 to 9 feet high and wide and timbers were being removed in a raise area. The drift had stopped, and blasting had just taken place to begin another raise. A mucking machine and locomotive were in the area preparing to load out rock and timbers, and several mats and roof bolts had been installed for ground support.

Mr. Rinaldi stated that the ground areas in the mine are "basically incompetent and rotten." He observed a slab of ground rock approximately 4 feet thick, 2 feet wide, and 6 feet long located approximately 10 feet high in the area where the mucking machine was operating. He observed that the slab had "bellied out" and was fractured. Although a support mat had been installed against the bottom of the slab, and several roof bolts had been inserted to support the slab, Mr. Rinaldi did not believe that the slab was securely tied to the rock strata behind the slab. He was concerned over the fact that ground of the type found in the mine was known to sometimes break loose under its own weight.

Mr. Rinaldi stated that he observed workers in the area of the slab, and that the mucking machine operator was working toward the area and would have been directly under the slab within a matter of minutes. In his opinion, it was reasonably likely that part of the rock below the protective mat could have come down and seriously injured or killed someone. Mr. Rinaldi confirmed that the cited condition was

abated by the next morning by the scaling down of some of the rock and the installation of additional support (Tr. 64-69).

Respondent's Testimony and Evidence

Edward P. Hunter, testified that at the time the loose slab rock citation was issued he was the lead miner in the areas. He stated that he checked the slab in question at least two or three times a day. He was responsible for installing the ground support in the area, and he indicated that support mats and bolts were installed over an area of some 10 feet by 20 feet. A mat and bolts were installed over the slab to support it, and he believed that before the slab would come down, it would first show signs of fractures and slacking (Tr. 77-78).

On cross-examination, Mr. Hunter stated his agreement with Mr. Rinaldi's estimates with regard to the size of the slab in question, and he confirmed that small fractures could be fouund in all of the rock in the area. He stated that the matting material is approximately 12 inches wide, and that the mat was "centered" over the slab. He confirmed that additional support timbers were installed after the citation was issued and that the slab is still in the area and has not fallen. He confirmed that it is normal practice to scale down loose rock, and that scaling took place before and after the issuance of the citation. He did not believe that the scaling conducted after the citation was issued had anything to do with the violation (Tr. 79-82).

Axel Carlson, respondent's safety director, testified that he was not at the mine when Mr. Myers and Mr. Sarginson conducted their radon daughters sampling. He stated that Ms. Reister is no longer employed by the respondent and has left the area. He suggested that she was not totally familiar with the testing requirements, and he expressed concern over the fact that sampling was not conducted during MSHA's initial "C. A. V." visit. He also expressed some doubt over the accuracy and dependability of MSHA's testing devices, but conceded that he could not prove that the sampling was done improperly or inaccurately. Mr. Carlson speculated that diesel fumes from machinery in the mine may have had a "false reading" impact on the samples, but conceded that he could not establish this.

Mr. Carlson confirmed that the respondent does not conduct its own radon daughters sampling because the testing equipment is expensive and the respondent can not afford to

purchase it. He stated that fans are used to increase ventilation when high exposure levels of radon may be suspected, but that the respondent relies primarily on natural ventilation to exhaust and remove contaminants from the mine.

Mr. Carlson indicated that at the time the radon daughters citation was issued, the men who were working were "breaking through" in order to increase the ventilation. The radon daughters sampling exposure results came after this occurred, and he believed that any miners passing through the 1700 level where the high samples were taken were exposed for no more than 1 or 2 minutes.

Mr. Carlson stated that he would have preferred to go to a conference with MSHA on both of the citations, but he could not explain why this was not done, and he indicated that the matter was simply not followed up by the respondent (Tr 83-88).

James Stricker, confirmed that he is the president of the C. S. C. Mining Company. He stated that he began mining in other areas in 1982, and that he began the development of the Star-Morning unit during the end of April, 1984, when the milling operation was started. Rehabilitation of the underground upper 1200 level began in August, 1984, and crews began working there for several weeks during September and October of 1984, when production was first beginning. At the time the citation was issued, rehabilitation was still taking place and there was no real production (Tr. 88-89).

With regard to the loose rock slab citation, Mr. Stricker indicated that the two miners in the proximity of the slab were two of his most experienced miners and that they would have been alerted if they believed that it was hazardous. He believed that the cited condition was a "judgment call" on the part of Mr. Rinaldi (Tr. 71).

Findings and Conclusions

Fact of Violation

Although the respondent had apparently stipulated to the veracity and accuracy of the inspector's radon daughters testing procedures and equipment in advance of the hearing, Mr. Carlson asserted that he had some question about the accuracy of Inspector Myers' equipment. He also implied that the test results may have been influenced by the presence of diesel fumes. However, the respondent presented

no evidence or testimony to support its assumptions, nor did it present any credible evidence to rebut MSHA's prima facie case.

I conclude and find that MSHA has established both violations by a preponderance of the evidence. The testimony of Inspector Myers and Inspector Rinaldi establish that the respondent failed to comply with the radon daughters monitoring and sampling requirements of 30 C.F.R. § 5-37(a)(2), and failed to insure that the cited loose ground was adequately supported or taken down as required by 30 C.F.R. § 57.3-22. Respondent has not rebutted MSHA's evidence and testimony in support of the violations. Accordingly, Citation Nos. 2085629 and 2393304 ARE AFFIRMED.

Significant and Substantial Violation

Inspector Rinaldi's testimony concerning his "S & S" finding with respect to Citation No. 2393304 is supported by his testimony. It seems clear to me that the condition of the cited slab rock in question presented a reasonable likelihood that an accident, with serious injuries, was likely, and the respondent has not rebutted this fact. Accordingly, Mr. Rinaldi's "S & S" finding IS AFFIRMED.

History of Prior Violations

MSHA's exhibit C-2 includes a summary of respondent's compliance record. It reflects that one prior citation was issued to the respondent in September, 1984. I conclude and find that the respondent has a good compliance record for the number of inspection days reflected in the report, and I have taken this into consideration in assessing the civil penalties for the citations which have been affirmed.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Remain in Business

Company President James Stricker stated that he has approximately 35 employees on his payroll, and that his daily production ranges from 25 to 50 tons. He stated that he tries to maintain a 30 ton a day production level. MSHA's exhibit C-1 reflects an annual 1984 production of 21,465 tons. I conclude and find that the respondent is a small mine operator, and this fact has been considered by me in assessing the civil penalties in question.

Mr. Stricker conceded that the civil penalties assessed for the violations in question will not adversely affect his

ability to continue in business. I adopt this as my finding.

Negligence

I conclude and find that both violations in question resulted from the respondent's failure to exercise reasonable care, and that this amounts to ordinary negligence.

Gravity

I conclude that the respondent's failure to monitor or sample for radon daughters exposure was serious. Continued exposure to radon daughters in excess of the required levels, over a period of time without sampling, presented a possible risk of exposure to the miners in the mine. Further, the failure by the respondent to recognize the hazards presented by the rock slab which had evidence of fractures and "bellying out" posed a potential hazard to the mucking operator and constituted a serious hazard. I conclude and find that this violation was also serious.

Good Faith Abatement

The record establishes that the radon daughters Citation No. 2085629 was abated and terminated by MSHA Inspector Jim Rinaldi after subsequent radon daughters samples reflected that the exposures sampled at the 1700 level station, and the 1700 level exhaust air north and south of the decline were .01 WL, .04 WL, and .03 WL. I conclude and find that the citation was abated in good faith.

With regard to Citation No. 2393304, the record reflects that the loose ground conditions were timely abated by scaling down some of the rock slab and installing additional support. I conclude and find that this citation was abated in good faith.

Civil Penalty Assessments

During closing arguments, MSHA's counsel asserted that the essence of the radon daughters citation lies in the fact that the respondent failed to monitor or sample the mine radon daughters exposure levels after it was determined through initial sampling that the levels were high and in excess of those levels permitted by the cited standard. Counsel asserted that section 57.5-37(a)(2), required the respondent to make weekly determinations in the mine working areas to insure that radon exposures were 0.3 WL or less.

Since this was not done, counsel concluded that the violation has been established and that the citation should be affirmed. Since the citation was non - "S & S," counsel asserted that a civil penalty assessment of $20 is reasonable.

With regard to the loose ground citation, counsel asserted that MSHA has established a violation and that a civil penalty assessment of $46 is reasonable.

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, the following civil penalties are assessed for the citations which have been affirmed:

Citation No.	Date	30 C.F.R. Section	Assessment
2085690	10/09/84	57.5-37(a)(2)	$20
2393304	03/06/85	57.3-22	$46

ORDER

The respondent IS ORDERED to pay to the petitioner the civil penalties assessed by me in this proceeding within thirty (30) days of the date of the decision. Upon receipt of payment, this case is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Faye von Wrangel, Esq., Office of the Solicitor, U.S. Department of Labor, 8003 Federal Office Building, Seattle, WA 98174 (Certified Mail)

Mr. Axel Carlson, Safety Officer, Star Morning Mining Company, Inc., 524 Bank Street, Box 1086, Wallace, ID 83873 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

OCT 10 1985

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 82-155-M
Petitioner	:	A.C. No. 42-00716-05015
	:	
v.	:	Docket No. WEST 83-60-M
	:	A.C. No. 42-00716-05503
KENNECOTT MINERALS COMPANY,	:	
UTAH COPPER DIVISION,	:	Magna Concentrator
Respondent	:	

DECISION AFTER REMAND

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Kent W. Winterholler, Esq., Parsons, Behle & Latimer, Salt Lake City, Utah, for Respondent.

Before: Judge Morris

On September 16, 1985, the Commission remanded the above cases to the undersigned judge for the assessment of appropriate penalties.

The statutory criteria for assessing civil penalties are set forth in 30 U.S.C. § 820(i), which provides as follows:

> (i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The evidence at the hearing indicated that the operator had a history of 37 violations (Tr. 44; Exhibit P5). In connection with WEST 82-155-M and WEST 83-60-M the Secretary proposed penalties respectively, of $40 and $20. These penalties

appear appropriate inasmuch as the respondent, with approximately 5,000 employees, should be considered a large operator. Further, the penalties will not affect the operator's ability to continue in business (Tr. 45, 46). I consider the negligence of the operator to be high inasmuch as the violative conditions were permitted to exist for some time (Tr. 29, 30, 31, 36). Such conditions were also open and obvious. The gravity is likewise high in view of the possibility that the violative conditions could cause a serious injury or a fatality (Tr. 23, 37). The file reflects the operator's good faith in that it rapidly abated the violations.

On balance, I deem that the penalties, as proposed, are appropriate. Accordingly, I enter the following:

ORDER

1. In WEST 82-155-M the proposed civil penalty of $40 is affirmed.

2. In WEST 83-60-M the proposed civil penalty of $20 is affirmed.

3. Respondent is ordered to pay the sum of $60 within 40 days of the date of this decision after remand.

John J. Morris
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Kent W. Winterholler, Esq., Parsons, Behle & Latimer, 185 South State Street, Suite 700, P.O. Box 11898, Salt Lake City, UT 84147 (Certified Mail)

/blc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 10 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF PHILLIP E. ANDERSON, DAVID HODGMAN, RICHARD McDOWELL, GARY WRIGHT, PHILLIP DANFORD, Complainants v. CONSOLIDATION COAL COMPANY, Respondent	:	DISCRIMINATION PROCEEDING Docket No. WEVA 85-108-D MSHA Case No. MORG CD 84-12 Pursglove No. 15 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF PHILLIP E. ANDERSON, DAVID HODGMAN, Complainants v. CONSOLIDATION COAL COMPANY, Respondent	:	DISCRIMINATION PROCEEDING Docket No. WEVA 85-109-D MSHA Case No. MORG CD 84-13 Pursglove No. 15 Mine

DECISIONS APPROVING SETTLEMENTS

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern complaints of alleged discrimination filed by the complainants against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Docket No. WEVA 85-108-D concerns a complaint by five miners alleging that the respondent required them to work in unsafe conditions and threatened to discharge them if they refused to work or complained to their union safety committee about the

alleged unsafe working conditions. Docket No. WEVA 85-109-D concerns a separate complaint filed by two of the five miners alleging that the respondent retaliated against them for filing safety complaints, and for filing the discrimination complaint which is the subject of WEVA 85-108-D. The two miners (Anderson and Hodgman), allege that as a result of their complaints, they were given "unsatisfactory work slips." They conclude that this action by the respondent was in retaliation for their safety complaints.

These proceedings were scheduled for hearings on the merits in Pittsburgh, Pennsylvania, on October 22, 1985. However, by joint motion filed with me on September 16, 1985, the parties propose to settle the cases.

Discussion

The parties state that the basis for the proposed settlement is the respondent's expungement of the employment record of complainants Hodgman and Anderson of the unsatisfactory performance notices and reference thereto in exchange for the dismissal of these cases, including the requests for assessment of civil penalties. Respondent has agreed to compromise the matters to avoid the time, expense, and risks attending litigation, including potential civil penalties, but makes no admission of violation of section 105(c).

MSHA states that in agreeing to forego the assessment of civil penalties, it considered, in addition to the time, expense, and risks of litigation, the fact that the respondent paid without contest civil penalty assessments of $2,950, for the withdrawal orders issued for conditions from which the complaint in WEVA 85-108-D arose. Further, MSHA points out that section 105(c) of the Act is uniquely designed to benefit individual miners, and that in establishing this security for individuals, the cause of health and safety in the workplace is satisfied. MSHA concludes that the proposed settlement of these cases satisfies the individual needs and thereby promotes the objectives of section 105(c) specifically and the Act generally.

MSHA's counsel states that with one exception, he has discussed the settlement with each individual complainant, and none has expressed any objection. The one exception concerns complainant Gary Wright. Counsel asserts that Mr. Wright has been inaccessible, but that he intends to communicate with Mr. Wright in writing and will furnish him with a detailed explanation of the settlement rationale. Counsel also asserts that MSHA's Morgantown special investigator has been requested to communicate the settlement terms to Mr. Wright, and that complainant David Hodgman has assured him that he will explain the agreement to Mr. Wright.

With regard to Mr. Wright, MSHA's counsel states that it is unlikely that he would have any objections to the terms of the agreement. Counsel points out that while the complainants were collectively part of a single action, the alleged retaliation, if any, was directed only to Messrs. Hodgman and Anderson, who claimed they were exposed to possible future discharge. Taken in context, counsel suggests that Mr. Wright would be hard pressed to justify any objection in the face of agreement among his comrades. Moreover, counsel points out that there exist no superior safety claims or financial losses that should have been taken into account.

Finally, MSHA's counsel states that the dangers perceived by the complainants in WEVA 85-108-D were made the subject of uncontested unwarrantable failure withdrawal orders, and that the respondent has paid the civil penalty assessments that resulted from those orders. Under the circumstances, counsel concludes that the likelihood of a repetition of the alleged discrimination appears slight and that the relief sought by the complainants and the interest in punishment by means of civil penalties are far outweighed by the elimination of the threat to employment without the necessity of litigation and its attendant risks.

In Secretary of Labor, ex rel. James M. Clarke v. T. P. Mining, Inc., 7 FMSHRC 989, July 2, 1985, the Commission stated that when seeking dismissal of a discrimination complaint in settlement of the case, the Secretary shall include in the dismissal motion and underlying settlement an express reference to the parties' agreement concerning the civil penalty. This requirement has been met in this case. The Commission also noted other cases before the Commission in which its judges have approved settlement dispositions and dismissal of discrimination cases despite the fact that neither the settlement agreement nor the motion to dismiss referenced the civil penalty aspects of the complaint. The Commission also took note of one prior decision where a judge dismissed a discrimination complaint where the settlement agreement expressly stated that the Secretary would not seek a civil penalty assessment for a violation of section 105(c) and that nothing contained in the agreement would be deemed an admission by the operator of a violation of the Act.

ORDER

After careful consideration of the arguments in support of the motion to approve the proposed settlement, I conclude

and find that the proposed settlement disposition of these cases is reasonable and in the public interest. Accordingly, it is APPROVED, and the Secretary's motion to dismiss the complaints IS GRANTED.

George A. Koutras
Administrative Law Judge

Distribution:

Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Robert M. Vukas, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 11 1985

GREENWICH COLLIERIES, A Division of Pennsylvania Mines Corporation, Contestant	:	CONTEST PROCEEDINGS Docket No. PENN 84-151-R Citation No. 2113447; 4/5/84
v.	:	Docket No. PENN 84-152-R Citation No. 2256541; 4/6/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Greenwich No. 1 Mine

ORDER OF DISMISSAL

Before: Judge Broderick

The above proceedings contest a citation and order which are part of the penalty proceeding in Docket No. PENN 84-216. The parties have submitted a motion to approve a settlement in that case. The settlement includes the withdrawal of the contest proceedings. I am approving the settlement, agreement by an order issued in the penalty docket.

Therefore, the above proceedings are DISMISSED.

James A Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Joseph T. Kosek, Esq., Greenwich Collieries, P.O. Box 367, Ebensburg, PA 15931 (Certified Mail)

Edward H. Fitch, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 11 '84

HELVETIA COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. PENN 84-210-R
	:	Order No. 2409293; 8/3/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. PENN 84-211-R
	:	Order No. 2409294; 8/3/84
	:	Docket No. PENN 84-212-R
	:	Order No. 2409295; 8/3/84
	:	Lucerne No. 9 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 85-54
	:	A.C. No. 36-05374-03554
v.	:	
	:	Lucerne No. 9 Mine
HELVETIA COAL COMPANY, Respondent	:	

DECISION

Appearances: William M. Darr, Esq., Helvetia Coal Company, Indiana, Pennsylvania, for Contestant/Respondent;
Linda M. Henry and Covette Rooney, Esqs., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern proposals for assessment of civil penalties filed by MSHA against the Helvetia Coal Mining Company pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for three alleged

violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The alleged violations were stated in three section 104(d)(2) orders issued by MSHA Inspector Lloyd Smith on August 3, 1984, during his inspection of the mine.

Helvetia Coal Company contested the civil penalty proposals, and also filed separate notices of contest pursuant to section 105(d) of the Act challenging the validity of the orders. The cases were consolidated for trial in Indiana, Pennsylvania, and the parties filed posthearing proposed findings and conclusions which I have considered in the course of these decisions.

Issues

The issues presented in these proceedings include the validity of the orders and whether or not the alleged violations resulted from an unwarrantable failure by Helvetia Coal Company to comply with the cited mandatory standards.

Assuming the fact of violation is established by a preponderance of the evidence, the question next presented is the appropriate civil penalties to be assessed for the violations, taking into account the criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301, et seq.

2. Sections 110(a), 110(i), 104(d), and 105(d), of the Act.

3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

Stipulations

The parties stipulated to the following:

1. The Lucerne No. 9 Mine is owned and operated by the Helvetia Coal Company.

2. The mine is subject to the 1977 Federal Mine Safety and Health Act.

3. The presiding judge has jurisdiction to hear and decide these proceedings.

4. The citations were properly served on the contestant-respondent Helvetia Coal Company.

5. The proposed civil penalty assessments will not adversely affect Helvetia Coal Company's ability to continue in business.

6. The overall 1984 mine production for the Rochester and Pittsburgh Coal Company, the parent company, was 7,233,311 tons, and the production for the Lucerne No. 9 Mine was 788,952 tons.

7. All of the violations were timely abated, and Helvetia Coal Company exhibited ordinary good faith compliance.

8. Helvetia's history of prior violations is shown in MSHA exhibit G-5, a computer print-out of Helvetia's compliance record for the period August 3, 1982 to August 2, 1984.

9. The hearing exhibits offered by the parties are authentic and may be admitted as part of the record in these proceedings.

10. There were no intervening "clean" inspections of the mine during the "104(d) chain" of violations issued by the MSHA inspectors in these proceedings.

11. There was no damage to the cable ground monitoring system, and no visual damage to the internal cable conductors. Order No. 2409293).

12. The underlying section 104(d)(1) citations supporting the section 104(d)(2) "chain" orders issued in these proceedings were properly issued and served on the respondent-contestant Helvetia Coal Company.

13. Helvetia's proposed exhibit R-1, is a portion of the 17 foot cable cited by Inspector Lloyd Smith, and counsel for Helvetia Coal Company agreed to maintain custody of the cable, and because of its size and bulk, agreed that it need not be made part of the actual record exhibits in these proceedings.

Section 104(d)(2) Order No. 2409293, 10:15 a.m., August 3, 1984, citing a violation of 30 C.F.R. § 75.517, states the following condition or practice:

> The 600 volt power cable supplying power to the 5 South 015 working section was not being fully protected in that there was evidence (scuff marks) that the cable was being struck by either mobile equipment or the supplies being hauled by mobile equipment. This cable is installed in the No. 4 entry about 43 feet outby Survey No. 1349 and the cable was hanging down from the mine roof ranging from 18 inches to 27 inches for a distance of about 17 feet and there was minor damage to the outer cable jacket in three locations. This entry is used as an off track supply roadway for the 5 South working section and the preshift mine examiner had placed his date, time and initials in the area within 50 feet as dated - 8/3/84 G.C. 6:49 AM.

Section 104(d)(2) Order No. 2409294, 11:05 a.m., August 3, 1984, citing a violation of 30 C.F.R. § 75.400, states the following condition or practice:

> There was an accumulation of loose coal being stored in the 2nd crosscut outby survey No. 1349 between the Nos. 4 and 5 entries of the 5 South 015 Section that measured 10 feet in width, 5 feet in length and ranged from 3 inches to 39 inches in depth. This area is outby the working section.

Section 104(d)(2) Order No. 2409295, 1:15 p.m., August 3, 1984, citing a violation of 30 C.F.R. § 75.303(a), states the following condition or practice:

> The preshift examination of the No. 4 entry of the 5 South 015 section from Survey Station No. 1349 outby for 2 crosscuts used as an off track supply haulage roadway was not adequate in that 2 violations of the mandatory standards were observed in the area and the area had been examined by a certified person on 8/3/84. The dates, times, and initials were - 8/3/84 G.S. 6:49 AM.

MSHA's Testimony and Evidence

Lloyd Smith, MSHA Inspector, testified as to his background and experience, and he confirmed that he inspected the mine on August 3, 1984, and issued the three orders which are the subject of these proceedings (Exhibits G-1, G-3, and G-4).

With regard to Order No. 2409293, Mr. Smith stated that he issued it after observing a power cable hanging down from the roof along the off-track supply road used to bring supplies to the section. The cable was hanging down for a distance of 18 to 27 inches for a distance of 17 feet along the rib. The remaining portion of the cable which extended along the entire length of the entry in question was hung up on insulated "J" hooks fastened to the roof bolts.

Mr. Smith stated that he observed several knicks, "minor damage," and scuff marks on the cable which was hanging down, and in view of some "white powdery" marks and scratches which he observed on the cable, he assumed that it may have been struck by a scoop loaded with supplies and cinder blocks. He observed several tire tracks under the cable, and he assumed that a scoop passed under the cable and struck it while bringing supplies into the section face area. The tire tread marks were "off to the side" of the roadway.

Mr. Smith stated that the cable may have been hung to the roof at one time, but he had no way of knowing whether it had been installed in the manner which he found it. He drew a sketch depicting how the cable was hung (exhibit G-6), and he confirmed that he cited a violation of section 75.517, because the cable portion which was hanging down was not installed on insulated "J" hooks and was therefore not fully protected since he believed it had been struck by a scoop carrying supplies to the section.

Mr. Smith believed that a hazard existed but that the extent of possible further danger to the cable would depend on the type of supplies being transported to the section, and whether or not they would cut or scrape the cable. Although the cable conductors and internal wires were not damaged, Mr. Smith believed that in time, striking the cable with equipment as it passed by presented the possibility of further damage to the cable, and in the event the internal wires were damaged a shock or electrocution hazard would result.

In view of the fact that the area in question was preshifted at 6:49 a.m., Mr. Smith believed that the mine operator was negligent. Mr. Smith stated that the cable condition was obvious and he could not understand how the preshift examiner could have missed it. He stated that the examiner is charged with the responsibility of looking for such conditions, and since he had not recorded the condition in his preshift report, Mr. Smith was of the opinion that the examiner was indifferent to the condition. Further, since the examiner's initials were placed on the rib approximately 50 feet from the cable condition, and since the hanging cable was readily observable, Mr. Smith was of the opinion that the violation was an unwarrantable failure.

Mr. Smith stated that the roof area was approximately 5 to 6 feet high, and that abatement was achieved by a mechanic taping the "small knicks" in the cable, and the cable being rehung on "J" hooks.

Mr. Smith confirmed that he subsequently modified the order to delete his "S and S" finding, and that he modified his negligence finding from "high" to "moderate," and his gravity finding from "reasonably likely" to "unlikely," the "number of persons affected" from one to none, with "no lost workdays." He explained that he made these modifications at the instruction of his supervisor during a conference held in MSHA's district office on August 30, 1984. The mine operator presented "new information" which reflected that the cable in question was scheduled to be moved on August 4, the day following the issuance of the violation, and his supervisor believed that it was unlikely that any further severe damage to the cable would occur within the following two working shifts. Mr. Smith confirmed that certain records produced by the company at the conference confirmed that the cable was scheduled to be moved, and that it was in fact moved. He also confirmed that the information provided by the company reflected that the preshift examiner may not have seen the cable condition, and that this prompted his supervisor to instruct him to modify his negligence finding.

Mr. Smith stated that after citing the cable condition, he proceeded to the intake air course where he looked between the No. 4 and No. 5 crosscuts and observed a pile of loose coal which appeared to have been dumped in the area. The entire area around the dumped coal was well rock dusted and in otherwise good condition, but the black undusted coal "stuck out like a sore thumb" and was readily observable. Mr. Smith stated that the loose coal was dumped in an area

10 feet wide, 5 feet long, and ranged in depth from 3 to 39 inches, and he confirmed that he made measurements to substantiate these findings. He also confirmed that he did not take samples of the coal, or otherwise test it because it was not rock dusted, was black in color, and it was obvious to him that it was combustible.

Mr. Smith stated that it appeared that the loose coal was loaded on a scoop and simply dumped in the area where he found it. Since he had cited the only scoop used in the section earlier during his inspection, and since that scoop was under repair and in the battery charging station, he concluded that the loose coal was dumped earlier in the day and prior to the preshift examination of 6:49 a.m. Further, since the section foreman Mark Thomas could not explain how the cable and coal conditions occurred and advised him that his crew had not been in the area prior to his inspection, Mr. Smith concluded that both conditions existed earlier than the day shift and that the preshift examiner should have reported them on his preshift report.

Mr. Smith believed that the preshift examiner should have noticed the loose coal earlier, and since "there was no way he could not have seen them if he looked," and since the condition was obvious, Mr. Smith believed that there was a high degree of negligence and that the violation was an unwarrantable failure. He conceded that his negligence finding was later modified to reflect a "moderate" degree of negligence, and that this was done at the August 30, district manager's conference.

With respect his gravity findings, Mr. Smith confirmed that he did not believe the violation was "S and S," and he saw no hazard present because the area was well rock-dusted, the closest power cable was 20 to 30 feet away, and he did not believe that the presence of the loose coal presented any injury hazard. Abatement was achieved by removing the one-scoop full of loose coal and re-rock dusting the area. He could not determine who dumped the coal in question, or how it got to the area where he found it, and no one ever admitted dumping it.

With regard to the order concerning the inadequate preshift examination, Mr. Smith stated that he issued it after checking the preshift examination books of August 3, 1984, and finding that the cable and loose coal conditions were not reported or recorded. Since he believed that both conditions were readily observable and should have been discovered by the examiner, he concluded that there was indifference on

the part of the examiner. Under these circumstances, he concluded that the inadequate preshift examination constituted an unwarrantable failure.

Mr. Smith believed that the inadequately conducted preshift examination constituted a hazardous condition because the examiner had not reported the conditions to the oncoming day shift, and because it was reasonably likely that the cable could have suffered severe damage if cut or damaged by supplies being transported in the scoop. He considered that a hazardous condition resulted from the failure by the examiner to note the conditions. Abatement was achieved by the examiner being "re-instructed" by the operator to include and report future violations in his preshift reports.

Mr. Smith confirmed that his negligence findings were subsequently modified at the August 30th conference from "high" to "moderate," and that his gravity findings were modified from "reasonably likely" to "unlikely," and that the "number of persons affected" was changed from one to none, and "no lost workdays." His previous "S & S" finding was also deleted.

Mr. Smith confirmed that he did not contact or interview the preshift examiner in question, and that he did not review the preshift examiner's records for the days or shifts prior to those of August 3, 1984 (Tr. 14-51).

On cross-examination, Mr. Smith stated that the cable in question was connected from the power center to the distribution center and he agreed that the electrical hook-up depicted by the operator's exhibit R-3 was accurate. Although he did not know the exact cable voltage, Mr. Smith was sure that it was suppling voltage to the section. He stated that the cable is advanced as the section mining cycle is advanced, and he confirmed that the excess cable which is not in use may be stored on the floor as long as it is out of the way and protected. He also conceded that the cable could be subjected to scrapes as it is pulled or dragged while being moved and advanced.

Mr. Smith confirmed that he detected no damage to the cable interior conductors, and he conceded that if the operator considered the cable to be a trailing cable it could be permitted to lie on the mine floor against the rib or be suspended, at the operator's option.

Mr. Smith examined a portion of the cable in question, exhibit R-1, and he identified two "inundations" or "knicks"

which had been taped and repaired, but he could not see the "scrapes" or "scuff marks" that he previously testified to. He conceded that it was possible that the inundations or knicks which he observed could have been caused by dragging or moving the cable along the mine floor, and that they could also be "manufacturer's defects." He also conceded that a number of "possibilities" propounded by the operator's counsel could have caused the cable to come loose from the "J" hooks.

Mr. Smith stated that the width of the entry where the cable was located was 18 to 20 feet. He confirmed that four "J" hooks were obtained to reinstall the cable, and that he observed no hooks on the mine floor near the cable. He also confirmed that he did not see the cable struck by a scoop, and he conceded that the tire tracks which he observed could have been there before the cable was struck.

Mr. Smith confirmed that when he issued the cable violation, he did not perceive it as a serious situation and that he did not require that the power be shut off before permitting the cable knicks to be taped.

With regard to the loose coal violation, Mr. Smith confirmed that the area was well rockdusted, and he indicated that the loose coal was located in a permanent cement-block stopping area, and that it "stuck out like a sore thumb." He conceded that it was possible that the coal was dumped after the preshift examination was conducted.

Mr. Smith stated that he did not know for a fact that the examiner was in the entry where the loose coal was found, and he denied that he was "angry" when he issued the order.

With regard to the preshift examination violation, Mr. Smith stated that it was obvious that the cited conditions existed, and that it should have been obvious to anyone passing through the areas.

In response to further questions, Mr. Smith stated that he believed the operator was treating the cable in question as a power cable subject to the requirements of section 75.517, but that the cable did meet all of the requirements of MSHA's Subpart G trailing cable standards. He confirmed that he has observed trailing cables in other working sections which were on the mine floor or suspended (Tr. 52-132).

Donald P. Jones, continuous-miner operator, Lucerne No. 9 Mine, testified as to his mining background and experience, and confirmed that he is a member of the mine safety committee and that he accompanied Inspector Smith during his inspection of August 3, in his capacity as the union walkaround representative. He confirmed that he observed the cable conditions cited by Mr. Smith, and he estimated that the cable was hanging down for an approximate distance of 18 to 27 inches for a distance of some 17 feet. He observed tire tracks under the cable, and also saw some scuff marks on the bottom of the suspended cable. The entry in question is used when supplies are transported to and from the section by a scoop at least once during the day. The entry was not straight at the location of the cable, and he believed that the cable could be struck by the scoop as it travelled the uneven entry.

Mr. Jones stated that the hanging cable was readily visible, and he indicated that the rest of the cable in question was securely hung by "J" hooks from the roof. He observed a telephone wire hanging from a roof bolt in the area where the cable was hanging down, and he speculated that it may have been used to secure the cable. After the condition was cited, the cable was re-hung, but he could not recall whether it was re-hung on a "J" hook or on the telephone wire. After the cable scrapes were taped by a mechanic, he helped him re-hang the cable. With regard to the coal accumulations citations, Mr. Jones stated that he observed "pure black coal" which appeared to have been dumped in the area noted by Mr. Smith, and he confirmed that it was readily noticeable since the surrounding area was well rock-dusted. He also confirmed that the scoop which was normally used in the section was not in operation the morning of the inspection because it had been parked at the charging station and had not been moved. He observed the preshift examiner's initials and date indicating that he had conducted a preshift at 6:49 a.m. that morning, but Mr. Jones had no idea how the coal got to the area where he observed it (Tr. 143-152).

On cross-examination, Mr. Jones stated that the coal which he observed appeared to be "fresh coal," and it was not rock dusted. The remaining area was rock-dusted, and in his opinion it had been rock-dusted before the coal was dumped. He confirmed that no coal samples were taken, and the area "was not damp, nor was it perfectly dry."

Mr. Jones stated that when the cable condition was first observed, he and Inspector Smith discussed the possibility of simply hanging it up. However, when Mr. Smith saw the scuff

on August 3, because Mr. Claassen called out that the section was safe for Mr. Thomas' crew to enter. At the time, Mr. Thomas was a union employee filling in for the regular shift boss.

Mr. Thomas identified exhibits R-6 and R-7 as the mine examination records for August 3, 1984, and he confirmed that they reflect that Mr. Claassen conducted his required examinations on that day. Mr. Thomas identified his signature, as well as Mr. Claassen's, and stated that he would not have counter-signed the reports if he had any doubts that Mr. Claassen had preshifted the section, or had not completed his examination (Tr. 245-258).

On cross-examination, Mr. Thomas stated that he relied on Mr. Claassen's assuring him that he had preshifted the section, and he believed that Mr. Claassen's crew on the preceding shift would probably have used the No. 4 entry because it is a shorter route out of the section and the mine height is better for travel. However, he could not state whether his own crew would have used that entry because he had only supervised the crew for 2 days prior to August 3. Mr. Thomas confirmed that the supply scoop has been known to carry more than three tiers of cinder blocks, and that it sometimes transported four tiers (Tr. 259-270).

Gregory Claassen, assistant mine foreman, testified as to his mining experience and background, and stated that he has worked at the mine for over 3 years as a mechanic and electrician. He has served as an assistant mine foreman for over a year, and he has a B.S. degree from Penn State, and holds mine foreman and electrician papers. He testified as to the training he received in conducting preshift and onshift examinations, and he stated that he is thorough in conducting such examinations. He confirmed that he is married and has two children, and he stated that since he is subject to fines and discharge if he does not conduct proper preshifts, he is particularly sensitive as to how to go about his preshift examinations.

Mr. Claassen testified that he did in fact conduct a preshift examination on August 3, 1984, and he testified as to his movements throughout the section on that morning. He stated that he began his preshift at approximately 5:00 a.m., and first inspected the belts and track entry. He then proceeded to the face area and down the No. 5 entry. After examining the faces, he proceeded down the No. 4 entry and walked out through the return rather than the supply doors where he had previously placed his initials, time and date.

Mr. Claassen stated that a scoop would have been used in the section on his shift in the area where Inspector Smith found the dumped coal because a pallet of rock dust was stored nearby. He stated that he observed the cable cited by Smith, but insisted that it was hung up on "J" hooks, and he did not see any portion of the cable hanging down. He indicated that the cable is hung at 8-foot intervals, and that it normally sags about 12 inches from where it is hung simply because of its weight. In his opinion, had the cable been hanging as described by Mr. Smith, he would have noticed it, and it would have taken him no more than 15 seconds to re-hang it on a "J" hook. Mr. Claassen denied that he observed the cable suspended for a distance greater than its normal height, and he stated that no one ever reported to him that the cable was hanging down or was being struck or scraped by equipment.

Mr. Claassen explained the preshift examination procedures, and he stated that he checks both sides of the crosscuts. He indicated that he pays particular attention to the crosscuts because the prior shifts place supplies in the crosscuts. With regard to the coal which was dumped in one of the crosscuts, Mr. Claassen stated that he looked into the crosscut in question during the preshift, and observed that it had a stopping and man door in it and that it was well rock-dusted. Other than gob, he observed no coal dumped in the area.

Mr. Claassen stated that normal operational procedures call for the scoop to be parked at the charging station between shifts while it is being charged. He believed that someone from his crew dumped the coal in the crosscut in question after he had conducted his preshift examination. He surmized that someone had used the scoop to clean the faces, and that when rock dust was required to be brought to the face area, the responsible individual probably dumped the coal in the crosscut where the gob was located so that he could use the scoop to transport the rock dust to the face area. He confirmed that he had assigned some of his crew to perform rock dusting and clean up at the faces, and since the crosscut where the coal was found was a "gobbing crosscut," he believed it was a logical place for anyone to dump coal that they wanted to get rid of. He also believed that a scoop operator would not want to leave a scoop charging with a bucket load of loose coal. Although he advised his crew that nothing would happen to them if the guilty party identified himself, no one came forward to admit to the violation.

With regard to any "re-instructions" given him to abate the citation issued by Mr. Smith for his purported failure to conduct a proper preshift examination, Mr. Claassen stated that a representative of the mine safety department, Mr. Petro, simply asked him if he had observed the coal and cable conditions cited Mr. Smith, and they generally discussed the violations. Mr. Claassen stated that at no time has Inspector Smith ever discussed the violations with him.

Mr. Claassen examined copies of the August 3, 1984, preshift reports, exhibits R-6 and R-7, and confirmed that the notations and signature were his. He stated that he never skips a preshift examination and that he has always conducted proper preshift examinations and reports the results in accordance with the law. He reiterated that he conducted a proper and thorough preshift examination on the morning of August 3, 1984, and denied that he observed the conditions cited Mr. Smith, or that he simply overlooked them and neglected to note them in his reports (Tr. 271-303).

On cross-examination, Mr. Claassen confirmed that the citations in question have been a topic of discussion at the mine. He stated that except for the time spent with the safety department on retraining, no one from mine management has discussed this case with him for the past year, and that it never occurred to him that anyone would want to discuss the matter with him (Tr. 305, 308).

Mr. Claassen stated that in order to take the scoop to the battery charging station, it would not be necessary to pass the area in which the coal in question was dumped. He confirmed that he started his preshift at 5:00 a.m., and that sometime between 6:30 and 6:40 a.m., he instructed his crew to scoop up the face areas, clean up the feeder, and rock dust (Tr. 311-314). He testified as to his movements about the section and explained the work that is normally done by his crew on the section (Tr. 314-318).

In response to further questions Mr. Claassen confirmed that Inspector Smith never discussed the inadequte preshift violation with him, and in his opinion, had he been asked to explain the circumstances, the citation would possibly not have been issued (Tr. 320).

Inspector Smith was called in rebuttal, and he stated that at no time prior to the hearing has anyone told him that the operator considered the cable in question to be a

trailing cable rather than a power cable. He also stated that during discussions with the operator's representatives at the close-out conference he conducted after completion of his inspection, the matter was not discussed, but at the district manager's conference, there was "a discussion" about the operator's contention that the cable could be treated as either a trailing cable or power cable, and that the method used for protecting the cable was at the "option" or "discretion" of the operator.

Mr. Smith stated that at the time he issued the cable violation he believed the operator was treating the cable as a power cable, and that this conclusion is based on the fact that the entire length of the cable was hung on insulated "J" hooks suspended from the roof. He conceded that had it been treated as a trailing cable, it could have remained on the mine floor and need not be suspended as long as it was otherwise protected from damage by mobile equipment.

Mr. Smith stated that he was not aware of the "experiment" testified to by Mr. Flack prior to the hearing, and that no one ever informed him that such a test had been conducted.

Mr. Smith confirmed that during a conversation with Mr. Petro of the company's safety department, he did advise Mr. Petro that if the company could produce or identify the person who dumped the loose coal or knocked down the cable, "it would be a different ball game" and he would reconsider the violations (Tr. 324-336).

Mr. Smith conceded that he made no attempts to contact Mr. Claassen to discuss the cited conditions with him, and when asked why, he replied "because the system, at most mines, you deal with the safety department" (Tr. 341).

Findings and Conclusions

Fact of Violations

Section 104(d)(2) Order No. 2409293

This order charges Helvetia Coal with a failure to fully protect a power cable installed along the rib in that it was hanging down and not secured for a distance of some 17 feet. The inspector noted scuff marks and minor damage to the outer cable jacket, and this led him to support his conclusion that it had not been adequately protected. The cited mandatory standard, 30 C.F.R. § 75.517, provides as

marks on the cable, he informed Mr. Jones that he would issue a citation, but Mr. Jones could not recall when Mr. Smith specifically informed him that he would issue an unwrrantable failure order. Mr. Jones believed that someone from mine management took pictures of the cable in question and he confirmed that he participated in the post-inspection conference concerning the violation. He denied any knowledge of any "amnesty" offers made by the company to any employees who would admit to dumping the coal in question (Tr. 153-157).

Helvetia Coal's Testimony and Evidence

Richard J. Flack, testified as to his mining background and experience, and he confirmed that he is employed by the Rochester and Pittsburgh Coal Company as a senior safety inspector and is assigned to Helvetia Coal's safety department. He stated that he is aware of the violations issued by Inspector Smith, and he confirmed that he participated in a company investigation concerning the cable and coal accumulations violations. He stated that the company's investigation focused on an effort to determine who was responsible for knocking the cable down and who may have dumped the coal in question. However, these efforts were fruitless, and no one came forward to admit that they were responsible, even though the company assured all employees that no action would be taken against them.

Mr. Flack identified a portion of the cable which was cited, and he confirmed that the piece of cable marked as exhibit R-1, was in fact a portion of the cable which was cited by Mr. Smith, and that he was present when the cable was taken down. He stated that the cable had one "abrasion area" and one permanent splice in it. He also stated that several days after the violation was issued, he participated in a company conducted experiment or "simulation" in which wires and flags were strung along the area where Mr. Smith found the cable hanging down. A scoop was loaded with supplies, including two or three courses of concrete blocks, and when it was driven under the wire which had been strung 17 feet from the roof, the scoop passed under the flags which had been attached to the wire without striking them. This led him to conclude that the scoop would not have caused the "scuff marks" testified to by Mr. Smith.

Mr. Flack described the mine bottom in the area where the coal was dumped as "damp," and he indicated that the mine roof heights in the area where the cable was observed were approximately 6 feet. Although Mr. Flack did not observe the conditions on the day the violations were

issued, he believed that the cable "was hanging as it was installed."

Mr. Flack testified that the cited cable was not required to be hung on "J" hooks, or otherwise suspended, because the company treated it as a trailing cable, rather than a power cable. He stated that any cable located between the power center and power distribution box may be considered a trailing cable, and that the company often uses its cable in this fashion. He has observed such cable being used both as a trailing cable and as a power cable, and he indicated that this was a common practice in the mine. As long as the trailing cable is protected from damage, the company has the option of hanging it up or simply leaving it on the mine floor against the rib.

Mr. Flack stated that the outer jacket of the cable which was cited was in good condition and well insulated. He conceded that knicks and abrasions will occur when the cable is being moved as the section mining cycle advances. He believed that the cable in question was moved frequently, and that since this was the case, the company treated it as a trailing cable and did not believe that it was required to be hung up on "J" hooks.

Mr. Flack stated that he participated in the conference held in MSHA's district office with respect to the violations in question. Although the company advised Inspector Smith's supervisor that the company treated the cable as a trailing cable, the supervisor apparently did not accept this defense since he did not order that the violation be vacated. With regard to the coal accumulation violation, Mr. Flack stated that Mr. Smith advised him that he would reconsider the matter if the company could produce the person who was responsible for dumping the coal. Mr. Flack stated further that Mr. Smith informed him that had the responsible person been produced by the company, Mr. Smith would not have issued the unwarrantable failure order for this violation. Mr. Flack confirmed that all of the personnel on the three working shifts in question were questioned, but no one would admit to the violations.

Mr. Flack was of the opinion that the preshift examiner, Gregory Claassen, is a responsible individual, and that he is careful in the manner in which he conducts his preshift examinations. Mr. Flack also believed that Mr. Claassen would have observed the cable and coal conditions during his preshift if the conditions had in fact existed at that time (Tr. 178-198).

On cross-examination, Mr. Flack testified further as to the simulated experiment which was conducted with the scoop and flagged wires. He stated that a "comparable" load of materials similar to "pallet materials" normally transported by the scoop were used in the experiment. He conceded that the demonstration was conducted solely by the company, and that no MSHA representatives were invited to attend. (Tr. 199).

Victor Pividori, testified that he is employed by the Rochester and Pittsburgh Coal Company as an electrical safety inspector, and that in this capacity he inspects 10 company mines, including the Lucerne No. 9 Mine. He testified as to his mining background and experience, and stated that he was formerly employed as a Federal mine inspector conducting electrical inspections of mine electrical systems. He identified exhibit R-3 as a schematic drawing of a typical underground mine electrical hook-up, and confirmed that the power systems in use in the mine in question are similar to those shown on the exhibit. He confirmed that a continuous-mining machine trailing cable could be connected directly to the A.C. power center shown on the diagram, and in his opinion the cable which was cited by Mr. Smith could either be hung up or laid on the mine floor at the company's discretion.

Mr. Pividori stated that under the provisions of section 75.606, a trailing cable may either be suspended or allowed to remain on the mine floor as long as it protected from damage. In his opinion, based on the testimony he has heard in this case, the cable was fully protected in the manner in which it was suspended from the mine roof at the time the inspector observed the condition on August 3. He stated that the scoop is 9 feet wide, and given the width of the entry, the cable would be visible. In further support of his opinion that the cable was adequately protected, he stated that "Mr. Flack's test convinced him" that this was the case.

Mr. Pividori described the cited cable as a three conductor 4/0 g. GC-cable, with a 2 KV rating, and while it is rated at 2,000 volts, only 575 volts were on it at the time the citation was issued (Tr. 228-237).

On cross-examination, Mr. Pividori conceded that he did not observe the cited conditions and had never been to the areas in question prior to the time the violations were issued. He also conceded that he was not present at the

time the cable demonstration was conducted by Mr. Flack (Tr. 238-239).

Mark D. Thomas, testified that he is employed as a section foreman at the Lucerne No. 9 Mine, and he confirmed his background and mining experience. He stated that he was aware of the violations issued by Inspector Smith on August 3, 1984, and he confirmed that the violations were served on him. He did not accompany Mr. Smith during his inspection rounds, but did discuss the conditions with him after being informed that the closure orders were issued. The cable violation was abated after several places in the cable were taped, and the cable was re-hung on one "J" hook, which Mr. Thomas indicated was found lying on the mine floor in the area. He conceded that it was possible that more than one hook was used to re-hang the cable, and he described the area as damp and well rock-dusted.

Mr. Thomas stated that during his discussion with Mr. Smith, Mr. Smith advised him that the hanging cable was "plainly obvious" and that he could not understand "how a guy could walk by and not see it." Mr. Thomas confirmed that Mr. Gregory Claassen, the previous shift foreman, conducted the preshift examination and placed his initials and the time 6:49 a.m., on a nearby rib to indicate that he had preshifted the area. Mr. Thomas agreed with the cable measurements made by Mr. Smith, and he conceded that had he conducted the preshifts examination, he would have seen the cable and coal conditions. However, he indicated that different shift crews used different entries when walking through the section, and he could not state how the violations occurred.

Mr. Thomas stated that Mr. Smith told him that he would issue a closure order because of the coal accumulations, but did not indicate that the cable violation would also be in the form of a closure order. Mr. Thomas stated that Mr. Smith "was hot" or disturbed when he saw the coal condition, but that he was not when he cited the earlier cable condition. The area where the coal was dumped had some gob against the wall, and except for the loose coal, the rest of the area was well rock-dusted.

Mr. Thomas stated that on the prior 2 days, Mr. Claassen had initialed and dated the rib near the supply doors when he conducted those preshifted examinations, but that on August 3, he had initialed at a different area, and Mr. Smith could not understand why this had happened. Mr. Thomas believed that Mr. Claassen did in fact conduct his preshift

follows: "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be adequately and fully protected."

In defense of this violation, Helvetia Coal maintains that the cable in question can be used as either a power cable or trailing cable at its option, and that at the time of the citation it was being used as a trailing cable between the power center and distribution box. Helvetia Coal also contends that it had the further option of placing the cable on the mine floor along the rib or providing additional protection by hanging it from the mine roof, thereby providing an extra indicia of protection. MSHA's proposed findings and conclusions do not address the issue.

I take note of the fact that in its Notice of Contest and answer to the civil penalty proposal filed by MSHA, Helvetia Coal never contended that the cable in question was a trailing cable. As a matter of fact, it specifically refers to the cable as a power cable, and stated that it is "commonly referred to as 600 volt cable." This defense was raised for the first time during the hearing. Helvetia's senior safety inspector Flack who viewed the cable after it was taken down, testified that any cable used between the power center and power distribution box may be used as a trailing cable, and as long as it is protected from damage, the operator has the option of hanging it up or leaving it on the mine floor. Since the cited cable had to be moved frequently, he believed that it was used as a trailing cable. Company electrical inspector Prividori, who was not present when the citation was issued, and who had never been in the area prior to the issuance of the citation, testified that under section 75.606, the company had the option of either hanging up a trailing cable or leaving it on the mine floor.

Inspector Smith believed the cable was being used as a power cable because it was hung on insulated "J" hooks for its entire length. Continuous-miner operator and safety committeeman Jones made no mention of the cable being used as a trailing cable. Section foreman Thomas, who discussed the matter with Inspector Smith shortly after the order was issued, did not contend that the cable was a trailing cable which did not have to be suspended for protection. Assistant section foreman and preshift examiner Claassen testified that when he viewed the cable, it was hung up on "J" hooks at uniform lengths. In explaining why the cable was hung at uniform lengths, he characterized it as a high voltage cable (Tr. 283). While explaining a past incident concerning a nail in a cable, he characterized the cable as

a power cable, and in fact identified it as identical to the power cable cited by Inspector Smith (Tr. 308). Mr. Claassen does not mention anything about a trailing cable.

The Dictionary of Mining, Mineral, and Related Terms, U.S. Department of Interior, 1968 Edition, defines the term "trailing cable" as follows at page 1156:

> a. A flexible cable designed to be movable while in use. B.S. 3618, 1965, Sec. 7. b. A flexible electric cable for connecting portable face machines and equipment to the source of supply located some distance outby. The cable is heavily insulated and protected with either galvanized steel wire armoring, extra stout braiding hosepipe, or other material. See also collectively screen trailing cable; individually screened trailing cable. Nelson. c. A cable for carrying electricity from a permanent line or trolley wire to a movable machine such as in mining or quarrying. It is usually paid out from a reel as the machine advances. Grove. d. A flexible, rubber-insulated conductor, or set of conductors, which carries electric power to a crane or other moving machine. Ham. e. A flexible insulated cable used for transmitting power from the main power source, such as a trolley wire, nipping station, or junction box, to a mobile machine. It includes cables between the nipping station and distribution center.

Whether or not the operator had an option to treat the cited cable as a trailing cable covered by section 75.606, or a power cable covered by section 75.517, and whether or not the cable met the requirements of the trailing cable regulations set forth in Subpart G, Title 30, Code of Federal Regulations, is not the issue here. The issue is whether the cited cable was in fact a power cable within the meaning of section 75.517, at the time the citation was issued, and whether it was fully protected. Even if one were to conclude that the cited cable was a trailing cable, a violation would still occur if it was not adequately protected.

The testimony in this case reflects that the cable in question was connected from the power center to the distribution center, and that its purpose was to supply power and

voltage to the working section. Mr. Pividori confirmed this during his explanation of the mine power distribution system as depicted in Helvetia Coal's Exhibit-3, and he identified the cable in question as the cable between the A.C. power center and distribution center (circled at the bottom of the diagram).

After careful consideration of the testimony and evidence adduced in this case, I conclude and find that at the time the citation was issued the cable in question was being used as a power cable. Helvetia's contentions to the contrary are rejected. I further find that the cited cable was not suspended or otherwise adequately protected for a distance of approximately 17 feet, and that the credible testimony of Inspector Smith that he observed some damage and scuff marks on the cable, and tire marks under it where it was hanging down for a distance of 18 to 27 inches, as well as the credible testimony of Mr. Jones that the cable could be struck by a scoop as it travelled the uneven entry, supports a conclusion that the cable was not fully protected and could have been struck by supply vehicles passing through the area which was used as a supply road for the section. With regard to Mr. Flack's experiment in an attempt to reconstruct the possibility of a scoop striking the cable, I note that it was conducted several days after the condition was abated and that MSHA representatives were not invited to be present. I find this experiment to be unrealiable and reject it to support a conclusion that the cable was fully protected. I conclude and find that MSHA has established a violation of section 75.517, by a preponderance of the evidence, and IT IS AFFIRMED.

Section 104(d)(2) Order No. 2409294

This order charges Helvetia Coal with failing to clean up an accumulation of loose coal which the inspector asserts was "stored" in an area outby the working section. The cited mandatory standard, 30 C.F.R. § 75.400, provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electrical equipment therein."

Although Helvetia Coal asserts that the coal accumulations cited by Inspector Smith were not present at the time of the preshift examination conducted by Mr. Claassen, it does not deny the existence of the cited coal accumulations at the time of Mr. Smith's inspection. Mr. Smith described the accumulations in detail, and confirmed his measurements

with respect to the extent of the accumulations. He confirmed that the accumulations consisted of a pile or "scoop full" of black undusted combustible coal which was readily observable in an otherwise well rock dusted crosscut. Accordingly, I conclude and find that MSHA has established a violation of section 75.400, and the violation IS AFFIRMED.

Section 104(d)(2) Order No. 2409295

This order charges Helvetia Coal with failing to conduct an adequate preshift examination in those areas where the prior cable and accumulations orders were issued. The cited mandatory standard, 30 C.F.R. § 75.303(a), provides in pertinent part as follows:

> (a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative.
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> * * * * * * *
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> If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine.
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> * * * * * * *
>
> Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary

> kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

Inspector Smith testified that he issued the order after reviewing the preshift examination books for August 3, 1984, and finding that the coal accumulations condition was not reported or recorded in the book. He contended that section foreman Thomas advised him that his crew had not been in the area where the accumulations were discovered prior to the time of his inspection. Since the accumulations were readily observable and were not recorded in the preshift book, Mr. Smith concluded that preshift examiner Claassen was less than attentive to his duties and conducted an inadequate examination. However, he conceded that it was possible that the coal could have been dumped after the preshift examination was conducted, and he admitted that he did not contact or speak with Mr. Claassen about the violation, and did not check the preshift record for the shifts prior to the one in question. Mr. Claassen testified that Mr. Smith never discussed the cable or accumulations violations with him prior to the date of the hearing.

With regard to the cable violation, Inspector Smith testified that the hanging cable was obvious and he could not understand how it could have been missed during the preshift examination. Since Mr. Claassen had placed his initials, date, and time of the preshift at a location some 50 feet from the hanging cable, and since no entry was made in the preshift book, Mr. Smith concluded that Mr. Claassen was indifferent to the condition and that his examination was inadequate. However, he confirmed that he modified his negligence finding after being advised by his supervisor that Helvetia Coal provided information during a conference on the violation which reflected that Mr. Claassen may not have seen the cable condition.

MSHA asserts that no miner from the day shift entered the areas where the violations were observed subsequent to 6:49 a.m., when Mr. Claassen made his preshift notations on the section, and before the orders were issued, and that no miner from the previous 12:00 midnight to 8:00 a.m., shift would have any reason to be in the areas after 6:49 a.m. Although MSHA fails to discuss its rationale for these conclusions in its posthearing submissions, I assume it relies on the testimony of Inspector Smith that Mr. Thomas told him that his crew had not been in the area, and the testimony of

Mr. Thomas that had he conducted the preshift examination, he would have observed the cited conditions. However, these conclusions are based on assumptions that the conditions in fact existed at the time Mr. Claassen made his preshift examination.

Mr. Thomas, a union employee, testified that he had no doubt that Mr. Claassen conducted a preshift since Mr. Claassen called out and advised him that the section was safe for Mr. Thomas' crew to enter. Mr. Thomas also confirmed that he would not have counter-signed the preshift book if he had any doubt that Mr. Claassen preshifted the section. Inspector Smith issued the cable and accumulations violations at 10:15 a.m., and 11:05 a.m., well after Mr. Claassen had called out that the section was safe for Mr. Thomas' crew to enter the section. Mr. Thomas testified that Mr. Claassen's crew on the previous shift could have been in the areas in question and that different crews used different entries, and that he had no knowledge as to how the violations occurred. This casts some doubt on Inspector Smith's assertion that Mr. Thomas told him that his crew had not been in the area, and Mr. Thomas was not asked whether he actually made that statement to Mr. Smith.

Mr. Flack considered Mr. Claassen to be a responsible and careful preshift examiner. Mr. Claassen, the preshift examiner on the 12:00 midnight to 8:00 a.m., shift, gave a detailed account of his movements throughout the section during his preshift examination. He denied the existence of the violations at the time of his examination, and denied that he simply overlooked the conditions or failed to report them. I find him to be a credible witness, and I accept his account as to how the coal accumulations may have been dumped in the crosscut to facilitate the transfer of rock dust from a nearby storage area to the faces after he had conducted his examination. I believe that the cited conditions occurred after Mr. Claassen's preshift examination and that he had no knowledge of their existence, and MSHA has produced no credible testimony or evidence to the contrary. In short, I conclude and find that MSHA has failed to prove that the violative conditions existed at the time of the preshift examination conducted by Mr. Claassen or that he was aware, or should have been aware of the conditions. Under the circumstances, I conclude that Inspector Smith had no credible basis for assuming that Mr. Claassen failed to conduct an adequate preshift examination. Accordingly, the order IS VACATED.

The Unwarrantable Failure Issue

MSHA's posthearing proposed findings and conclusions simply conclude that the cable and accumulations violations were the result of Helvetia's unwarrantable failure to correct the violations. There is absolutely no supporting arguments for this conclusion, and I can only assume that MSHA believes the violations were unwarrantable simply because Helvetia Coal was negligent, or that Mr. Claassen failed to detect the violations during his preshift examination. At the same time, MSHA's proposed findings state that "the operator's negligence was accurately assessed as moderate" as to all three violations. Further, Inspector Smith conceded during the hearing that he subsequently modified his negligence findings, and copies of the modifications are of record (exhibit G-1, G-3, and G-4).

On the facts of this case, I believe one can reasonably conclude that Inspector Smith issued the orders in question because of his unsupported conclusions and assumptions that preshift examiner Claassen was indifferent or lackadaisical in going about his duties. Since I have vacated the order on this issue, there is no need to address the unwarrantable failure question with respect to that violation. As to the cable and coal accumulations violations, the question of whether they were unwarrantable failure violations necessarily must focus on those particular conditions. On the facts of this case, there is no evidence that the cited conditions were the result of Mr. Claassen's purported indifference or lack of diligence. Nor is there any evidence that Helvetia Coal was indifferent or acted less than diligent in allowing the conditions to exist.

In view of the foregoing, I conclude and find that MSHA has failed to establish that the cable and coal accumulations resulted from Helvetia Coal's unwarrantable failure to comply with the requirements of sections 75.517 and 75.400. Accordingly, the inspector's findings in this regard ARE VACATED, and the section 104(d)(2) orders in question ARE MODIFIED to section 104(a) citations, and ARE AFFIRMED as modified.

The "significant and substantial" Issue

In its posthearing proposed findings and conclusions with respect to the power cable citation, No. 2909293, MSHA asserts that the gravity of an injury resulting from the violation "was appropriately assessed as fatal, as the miners were exposed to a potential electrical shock hazard." MSHA also asserts that the area "is used as a supply haulage

roadway, so the likelihood of an injury is reasonably likely." However, Inspector Smith confirmed that he subsequently modified his gravity findings on the face of his citation to reflect "no lost work days," "unlikely," "no individuals exposed to any hazards," and he modified and deleted his "S&S" finding. Under the circumstances, I fail to comprehend how anyone can reasonably conclude that a fatality would have resulted from the violation.

Mr. Smith conceded that the cable is advanced as the mining cycle is advanced, and he confirmed that during a conference held after the citation was issued Helvetia produced records to confirm that at the time the violation was issued, the cable was scheduled to move, and in fact was moved. Under the circumstances, I believe it is reasonable to conclude that the violative condition would not have gone undetected, and that it would have been corrected before any further damage to the cable would have occurred. However, since the inspector deleted his "S&S" finding, that issue is moot.

History of Prior Violations

Exhibit P-5, is a computer-printout summarizing the mine compliance record for the period August 3, 1982 through August 2, 1984. That record reflects that Helvetia Coal has paid civil penalty assessments totaling $19,798, for 398 violations issued at the mine during the 2-year period. Thirteen prior violations of section 75.517, and 45 prior violations of section 75.400, are noted on the printout. I do not consider this to be a good record of compliance, and that fact is reflected in the civil penalties which I have assessed for the violations which have been affirmed.

Good Faith Abatement

The parties have stipulated that the violations were timely abated, and that Helvetia Coal exhibited ordinary good faith compliance in this regard. I adopt this as my finding in this case and have taken it into account in assessing the civil penalties.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business

The information of record as noted in the stipulations reflects that Helvetia Coal is a large mine operator, and

the parties have stipulated that the proposed civil penalties will not adversely affect Helvetia's ability to continue in business.

Negligence

I conclude and find that the cited coal accumulations and cable violations resulted from the operator's failure to exercise reasonable care, and that its failure to correct the conditions before they were discovered by the inspector constitutes ordinary negligence.

Gravity

With regard to the cable citation, the parties have stipulated that there was no damage to the cable ground monitoring system, and no visual damage to the internal cable conductors. However, Inspector Smith's testimony reflects that the cable had been subjected to some abuse, and when he observed it appeared to have been "knicked" and had scuff marks on it. While it is possible that this occurred while advancing or dragging the cable on the mine floor, the fact remains that it was hanging down and not secured high enough to prevent it from being struck by passing machines. Continued damage of this kind, although somewhat minor at the time, could have led to more serious problems. Under the circumstances, I find that this violation was serious.

With regard to the coal accumulations violation, while it is true that the coal had been rock dusted and the surrounding area was in condition, the coal accumulations were not rock dusted and were black. These accumulations were present over an area 10 feet wide and 5 feet long, and they ranged from 3 to 39 inches in depth. Although it appears that the coal was "dumped" in the crosscut, its existence in the working section presented a possible or potential fire hazard. Accordingly, I find that this violation was serious.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

Citation No.	Date	30 C.F.R. Section	Assessment
2409293	8/3/84	75.517	$ 150
2409294	8/3/84	75.400	$ 250

ORDER

Respondent IS ORDERED to pay the civil penalties assessed above in the amounts shown within thirty (30) days of these decisions and order, and upon receipt of payment by MSHA, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

William M. Darr, Esq., Helvetia Coal Company, 655 Church Street, Indiana, PA 15701 (Certified Mail)

Linda M. Henry and Covette Rooney, Esqs., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 11 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 84-8-M A.C. No. 22-00032-05501
v.	:	Crenshaw Mine & Plant
KENTUCKY-TENNESSEE CLAY CO., Respondent	:	

DECISION

Appearances: Charles Merz, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Petitioner;
No appearance for Respondent

Before: Judge Fauver

This civil penalty case was called for hearing at 9:30 a.m., August 6, 1985, at Lexington, Kentucky, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. Petitioner appeared by counsel. Respondent did not appear, and was held in default, whereupon evidence was received from Petitioner.

Having considered the evidence and the record as a whole, I find that a preponderance of the substantial, probative, and reliable evidence establishes the following:

FINDINGS AND CONCLUSIONS

1. Respondent is a large operator of several surface mines. At all relevant times Respondent operated Crenshaw Mine and Plant producing clay for sale in or substantially affecting interstate commerce. About 40 employees were employed at the site; work was scheduled for three shifts a day, five days a week.

2. On August 17, 1983, Federal Mine Inspector Walter Turner inspected the Crenshaw Mine and Plant. He observed that the front windshield on front-end loader No. 1526 was cracked, obstructing much of the operator's viewing area. He issued Citation No. 2079936, charging a violation of 30 C.F.R. § 55.9-11.

(a) Negligence. This condition was known by Respondent, and existed for at least one week. It was clear negligence for Respondent to operate the equipment with the cracked windshield.

(b) Gravity. The cracks in the windshield were on the operator's side and obstructed about one-quarter of his vision to the front of the vehicle. This was a serious hazard, endangering the driver and other persons who might be injured in the event of an accident.

(c) Compliance History. Respondent had no prior violation of § 55.9-11 at this site in the 24-month period before the citation.

3. On August 17, 1983, Inspector Turner observed that the front windshield on front-end loader No. 1528 was cracked, obstructing much of the operator's viewing area. He issued Citation No. 2079841, charging a violation of 30 C.F.R. § 55.9-11.

(a) Negligence. This condition was known by Respondent, and existed for at least a week. It was clear negligence for Respondent to operate the equipment with the cracked windshield.

(b) Gravity. The cracks in the windshield were on the driver's side and obstructed about one-quarter of his vision to the front of the vehicle. This was a serious hazard, endangering the driver and other persons who might be injured in the event of an accident.

(c) Compliance History. Respondent had no prior violation of § 55.9-11 at this site in the 24-month period before the citation.

4. On August 17, 1983, Inspector Turner observed that the No. 79 mill bottom and top bag conveyor tail pulleys were not guarded, exposing the bag machine operator to unguarded pinch points. He issued Citation No. 2079935, charging a violation of 30 C.F.R. § 55.14-1.

> (a) Negligence. This condition was known by Respondent. Respondent was negligent in operating the equipment without guards over the pinch points.
>
> (b) Gravity. This was a serious hazard, endangering the bag machine operator and others who might come into contact with pinch points.
>
> (c) Compliance History. Respondent had one prior violation of the cited standard about one month before the citation.

5. On August 17, 1983, Inspector Turner observed that the No. 53 mill bottom and top bag conveyor tail pulleys were not guarded, exposing the bag machine operator to unguarded pinch points. He issued Citation No. 2079937, charging a violation of 30 C.F.R. § 55.14-1.

> (a) Negligence. This condition was known by Respondent. Respondent was negligent in operating the equipment without guards over the pinch points.
>
> (b) Gravity. This was a serious hazard, endangering the bag machine operator and others who might come into contact with pinch points.
>
> (c) Compliance History. Respondent had one prior violation of the cited standard about one month before the citation.

6. On August 17, 1983, Inspector Turner observed that the No. 63 mill feed conveyor tail pulley was not guarded. He issued Citation No. 2079940, charging a violation of 30 C.F.R. § 55.14-1. The tail pulley was in a pit area about six feet below the plant floor. The pulley wheel had spokes and the wheel, top and sides were unguarded. A ramp led to the tail pulley. The ramp was not obstructed or barred by a gate or sign. The pulley area required regular cleaning and maintenance. A preponderant and reasonable inference from the evidence indicates that spillage was probably. shoveled onto the conveyor in the pit while the conveyor was moving. At least one employee was subject to exposure to the unguarded pulley.

(a) Negligence. Respondent knew about this condition, and was negligent in not putting a guard on the pulley.

(b) Gravity. This was a serious safety hazard, exposing at least one employee to danger.

(c) Compliance History. There was one prior violation of the cited standard in the 24-month period before the citation.

7. On August 17, 1983, Inspector Turner observed that the No. 63 Mill grinder V-belts and pulleys were not guarded. The grinder was about three feet below ground level. A ramp providing access to the machine was not obstructed or barred by a gate or sign. Based on the condition observed, Inspector Turner issued Citation No. 2079939, charging a violation of 30 C.F.R. § 55.14-1.

The findings and conclusions as to negligence, gravity, and compliance history in No. 6, above, apply to this citation also.

8. On August 17, 1983, Inspector Turner observed that No. 53 Mill feed conveyor tail pulley was not guarded. The tail pulley was about six feet below ground level. A portable ladder provided access to the pulley area. The ladder was not barred or obstructed to access. A reasonable inference from the evidence is that spillage around the pulley was shoveled onto the conveyor while the conveyor was moving. Inspector Turner issued Citation No. 2079938, charging a violation of 30 C.F.R. § 55.14-1.

(a) Negligence. This condition was readily observable. Respondent was negligent in failing to guard the pinch points of this equipment.

(b) Gravity. This was a serious safety hazard, exposing at least one employee to danger.

(c) Compliance History. There was one prior violation of the cited standard in the 24-month period before the citation.

DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

I find that each of the violations charged was proved, was due to negligence, and was a serious violation that could contribute to a fatal or serious injury. Respondent is credited with making a good faith effort to achieve rapid compliance after receiving each citation.

Considering each of the criteria for assessing a civil penalty under section 110(i) of the Act, I find that an appropriate civil penalty for each violation is as follows:

Citation	Civil Penalty
2079936	$100
2079841	100
2079935	100
2079937	100
2079940	50
2079939	50
2079938	50

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Respondent violated the safety standards as charged in the above listed citations.

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay to Petitioner the civil penalties assessed above, in the total amount of $550, within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Charles Merz, Esq., Office of the Solicitor, U.S. Department Labor, 280 U. S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. Philip W. Pace, Manager, Industrial Relations/Safety Kentucky-Tennessee Clay Company, P. O. Box 449, Mayfield, KY 42066 (Certified Mail)

kg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 11 1985

WESTMORELAND COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 82-152-R Order No. 886894; 1/12/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Eccles No. 6 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 82-369 A.C. No. 46-01514-03501
v.	:	Eccles No. 6 Mine
WESTMORELAND COAL COMPANY, Respondent	:	

DECISION

Before: Judge Melick:

This case is before me on remand by the Commission on September 30, 1985, for reconsideration of the amount of civil penalty assessed in light of the Commission's finding that the violation in this case "did not result from Westmoreland's indifference, willful intent, or serious lack of reasonable care."

The standard at issue, 30 C.F.R. § 75.202, requires that "overhanging" ribs shall be "taken down" or "supported." The Commission has affirmed the factual findings in this case that Westmoreland Coal Company violated that standard by allowing work to be done beneath a known overhanging rib that had neither been "taken down" nor "supported." This action or omission resulted in the death of a miner allowed to work beneath that overhanging rib.

It is established that the responsible section foreman knew of this violative condition but neither took down nor supported the cited overhanging rib before allowing work to be performed beneath it. Within this framework, a finding of operator negligence is warranted.

In assessing a penalty herein I have considered that before the fatal rib fall several miners had made unsuccessful efforts to take down the offending rib with a slate bar and with the roof bolter canopy and that some concluded there was no hazard. I have also considered that the foreman himself had tried unsuccessfully to bring it down, striking it four or five times with a slate bar (T. 227). I also note however that the foreman failed to take other measures known and accepted in the industry for removing such a rib. The miner operator, Albert Honaker, testified that "if that man had said he thought it was unsafe and wanted me to take the miner back in there and cut it down, sure, I'd have cut it down." (T. 256). There is, moreover, no evidence that the stopping could not have been built in a location other than beneath this violative overhanging rib.

Considering all the criteria under section 110(i) of the Federal Mine Safety and Health Act of 1977 as reviewed in my decision in this case dated January 18, 1983, (5 FMSHRC 132) and in particular, reconsidering the negligence of the mine operator as directed by the Commission, I find that a civil penalty of $8,000 is appropriate.

Wherefore Westmoreland Coal Company is directed to pay a civil penalty of $8,000 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

John A. Macleod, Esq. and Thomas C. Means, Esq., Crowell & Moring, 1100 Connecticut Avenue, N.W., Washington, D.C. 20036 (Certified Mail)

Scott L. Messmore, Esq., Westmoreland Coal Company, P.O. Drawer A & B, Big Stone Gap, VA 24219 (Certified Mail)

Barry F. Wisor, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

rbg

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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 16 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. CENT 85-24-M
	:	A.C. No. 16-00352-05501 ZWI
v.	:	
	:	Gramercy Alumina
ROBERTS ELECTRIC, INC., Respondent	:	

DECISION

Appearances: Chandra V. Fripp, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner; William V. Roberts, Jr., President, Bill Roberts, Inc., Metairie, Louisiana, pro se.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of $20, for a violation of mandatory safety standard 30 C.F.R. § 55.12-12, as stated in a section 104(a), Citation No. 2237173, served on the respondent by MSHA Inspector Joe C. McGregor on November 24, 1982. The citation was issued after the inspector found an inadequate connection on an electrical box.

The respondent filed a timely answer and contest, and the case was docketed for hearing in New Orleans, Louisiana, during the term August 6-8, 1985, along with several other cases, in which the same inspector issued citations.

Issue

The issue presented in this case is whether or not the respondent violated the cited safety standard, and if so, the appropriate civil penalty which should be assessed taking

into account the civil penalty assessment criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated that the respondent is an electrical contractor who regularly employs six employees. At the time of the inspection by Inspector McGregor, the respondent was performing electrical contract work at the Gramercy Alumina Mine, an operation owned and operated by the Kaiser Aluminum Company. The respondent employed 8 to 10 employees to perform this contract work. Respondent's representative indicated that his company has an annual work volume of approximately two million dollars. He also indicated that his company performs regular contract work at the mine in question, and he concedes that his company is often called upon to provide electrical contract services at the mine (Tr. 608).

Amendment to the Pleadings

Petitioner's counsel moved to amend the pleadings to reflect an alleged violation of mandatory safety standard 30 C.F.R. § 55.12-8, rather than section 55.12-12, as alleged in Inspector McGregor's citation. In response to questions from the bench, Mr. Roberts stated that he was fully aware of the cited condition or practice, and that abatement was accomplished immediately upon notification to his supervisory employee at the mine who was supervising the work being performed that a citation would issue. Inspector McGregor conceded that he had cited the wrong standard, but he could not recall the reason for citing section 55.12-12. After further consideration of the motion to amend, I concluded that the respondent has not been prejudiced by the amended citation, and granted the petitioner's motion to amend (Tr. 8, 13-14).

Petitioner's Testimony and Evidence

MSHA Inspector Joe C. McGregor testified as to his background and experience and he confirmed that he issued the citation in question. He confirmed that he has been an MSHA

inspector for approximately 7 years and has conducted approximately 300 inspections during this period of time. He stated that he has 20 years' mining experience, and has attended the MSHA Mining Academy at Beckley, West Virginia for an initial training session, and that he has retraining for 2 weeks every year. His electrical experience consists of an 8-week training course and on-the-job training as an inspector. He conceded that he is not an electrician and holds no electrician's papers or licenses (Tr. 16-18; 24-25).

Mr. McGregor stated that the respondent is an electrical contractor who performs work at Kaiser Aluminum's Gramercy Alumina Mine, and he described that operation as an alumina milling plant where raw aluminum ore is refined and processed. He indicated that Kaiser Aluminum imports its raw materials from Jamaica, and exports its finished product to several states. He confirmed that the Kaiser plant has an MSHA legal identity number, is regularly inspected by MSHA, and in his opinion, the mine in question is subject to MSHA's enforcement jurisdiction (Tr. 23-24).

Inspector McGregor testified that he issued the citation after observing an extension cord approximately 50 feet long hooked into an electrical box on the east wall of the plant steam turbine room. The cord entered the box through the front panel box door which was opened several inches to permit the cord to enter. The ends of the cord were bare because they had been stripped to facilitate the connection inside the box, and the cord was otherwise properly insulated. The panel door opened side-to-side, and Mr. McGregor stated that he was able to observe the exposed wires and the posts to which they were attached inside the panel box without opening the door further. The manner in which the connection was made did not allow the panel box door to close completely, and this left the bare wires inside the box accessible to employees. The cord in question should have entered the box through a proper fitting through a hole in the side of the panel box, rather than under the panel door. In addition, a strain clamp should have been used to keep the cord tight and to prevent it from being pulled or disconnected from the box (Tr. 18-22).

Mr. McGregor believed that the open electrical box door presented a shock hazard to the people working in the steam room, and he observed people in the turbine room. However, the cord was not in use at the time he observed the condition (Tr. 22-23).

On cross-examination, Mr. McGregor confirmed that he is not a licensed electrician and has never worked for an electrical contractor or in an electrical shop. He also confirmed that the cord in question was not a "department store extension cord," and that it was a heavy duty cord. He did not know the voltage rating of the cord, and used no meters to determine this. He indicated that three wires were hooked up inside the box in question, and he assumed that the voltage was 120. He was told that the cord was used for power tools. Although the voltage ratings of electrical panel boxes are normally 120, 240, or 480, he did not know the rating of the box in question, and the box contained a disconnect switch with a pull handle (Tr. 24-29).

Mr. McGregor explained that he was familiar with the type of heavy duty extension cord in question, and he stated that electricians use them often to supply power to power tools which are used a good distance away from the power source. At times, the cords are equipped with plug-in boxes so that three or four additional power outlets may be used (Tr. 36-37). Although he saw no hand tools around, someone told him the cord was used for that purpose (Tr. 38). He agreed that such a temporary hook-up was made because a source of power was needed to operate hand tools.

Mr. McGregor did not believe it was normal to use a temporary hook-up as the one he observed, and in his view the normal procedure would be to tap into a box by going through proper fittings (Tr. 40). Although the act of "tapping into the box" was not a violation, Mr. McGregor believed that failure to use a proper fitting was (Tr. 40). He did not believe that punching a hole through the side of the box and fitting the cord through proper restraining fittings would have caused any problems (Tr. 40-41). Since the respondent indicated that his men had often performed work at the plant, Mr. McGregor believed that a plug-in device of some kind should have been installed on the box to provide a properly fitted source of power. He conceded that the contractor people performing the electrical work were qualified electricians and knew what they were doing (Tr. 42).

Mr. McGregor confirmed that as soon as the condition was called to the attention of the steam turbine room supervisor, an electrician immediately disconnected the cord and shut the box lid. Since he did not believe that any of the respondent's employees were working in the room the day of the inspection, Mr. McGregor believed that the connection was probably made the day before (Tr. 53). He conceded that he

had no reason to believe that the connection was not temporary, but did not remember seeing any "flag" device attached to the cord to indicate that it was a temporary connection (Tr. 54).

Respondent's Testimony and Evidence

Respondent Bill Roberts asserted that the box in question has a protective cover plate which fits over the breakers and the interior of the box so that none of the electrical connections are exposed. He also contended that the box was in fact a disconnect switch. Since the cord was connected, it was impossible for the lid to close tightly over the cord. He also contended that there were no exposed bare wires, and that anyone contacting the switch enclosure or box could not be shocked. He conceded that if someone deliberately went out of their way to reach into the box opening, they could "possibly have gotten shocked," but he indicated that "people just don't stick their hands in boxes or go out of their way to make an unsafe condition" (Tr. 32). He also indicated that people have been working in the location in question for 10 to 20 years and that no one has ever been hurt by the type of temporary connection found by the inspector (Tr. 32-33).

Mr. Roberts stated that the heavy duty cord in question is rated at 600 volts, and he identified it as an oil resistant heavy duty "SO" cord with a one-eighth inch neoprene jacket covering the cables. He also indicated that "one can beat on it with a hammer" without puncturing it, that it was made "to run open and exposed," and that it was an approved cable for the application in question (Tr. 36). He drew a sketch of the connection in question on a blackboard in the courtroom, and except for the manner in which the door opened (side-to-side as opposed to up and down), Inspector McGregor agreed with the sketch depicting the manner in which the connection was made (Tr. 45-46).

Mr. Roberts stated that the connection in question probably existed for 1 day. He explained that temporary connections of this kind are made so that his men can drill for straps or pipe installations, and when they move about the plant and run out of extension cord, they have to tap in at another location in order "to keep the job moving throughout the power house." He described the turbine area as "a big machinery room," and he indicated that the area does not have many electrical receptacles. Although there are 440 volt receptacles for welding machines, his men were using a

120-volt connection. He could not recall the specific work being performed by his men (Tr. 56-57).

Mr. Roberts also described the area as an isolated room which housed the steam turbines for the plant, and he likened it to a power house. He confirmed that the turbines are remotely controlled through the use of instrument panels, and that except for maintenance personnel who go into the area "once in a while," there is no one in the area (Tr. 57). He also indicated that the disconnect switch box was a 240-volt device, and the connection in question was made by "tapping" to each "leg" of 120 volts, with one tap to ground (Tr. 58).

On cross-examination, Mr. Roberts agreed that the "SO" cord in question was a "power wire," and he considered it "a power cord up to 600 volts" (Tr. 59). He stated that he previously worked at the Gramercy plant from 1964 to 1969, and was familiar with the plant and the turbine room where the condition was cited. He detailed his electrical design and contracting background and experience, and he testified as follows in response to questions from petitioner's counsel (Tr. 60-62):

> Q. If, such as in the standard there's a distinction made between power lines and cable, what is that distinction in your mind, or is there a distinction to you?
>
> A. Well, it depends on what you're referring to when you say power, and cable. Power designates voltage; cable designates wire.
>
> Q. And in your opinion, this connection was a power wire cable?
>
> A. Well, let me say this. Any cable that's got a voltage has got power. It could be one volt, it could be 40,000 volts.
>
> Q. So then there's really no distinction?
>
> A. I would say that -- the only distinction between a power cable, you'd refer to a single cable -- a single cable never normally runs over 32 volts.
>
> A power cable could be classified anything over 32 volts. The code designates 32 volts and below as low voltage wires.

Q. All right. I'm trying to understand your argument, and you can tell me if I'm wrong.

My understanding is that if -- this was a temporary connection is your contention, and because it was temporary, that you were not required to do anything other than what you did to get this power.

If it was a permanent position, would you have done -- a permanent connection, would you have done otherwise?

A. In a permanent connection on this particular situation, we would have ran a conduit. We wouldn't have ran a portable cable at all. Flexible wire -- we would have put it in pipe. That is Kaiser's standard, and that's also the standard by the National Electrical Code -- that it be run in a conduit, meaning a metal pipe, and we would have ran that in a metal pipe at Kaiser, had that been a permanent connection.

Q. So your contention is that this was temporary, and that's why it's not a violation of the standard?

A. Yes, ma'am.

Findings and Conclusions

Fact of Violation

The respondent is charged with a failure to comply with the requirements of mandatory safety standard 30 C.F.R. § 55.12-8, which provides as follows:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

The respondent conceded that the cord in question was a cable (Tr. 60-62). Given the voltage of the cord, and the fact that it was connected to provide power to certain hand tools, I conclude and find that the cord was a power cable within the meaning of section 55.12-8.

Inspector McGregor and petitioner's counsel were in agreement that had the cord in question been installed through a proper bushing or fitting, it would have allowed the lid of the panel box in question to close tightly, thereby not exposing anyone walking by the box to any hazard. Had this been done, they both agreed that no citation would have been issued (Tr. 47-50). Respondent agreed that had the connection been a permanent one, it would have to be provided with some type of a strain-relief connector or a bushed opening in the box (Tr. 34, 50). Respondent's contention is that the connection was temporary, that they are made "all the time," and that it did not present any shock hazard because the wires connected to the terminals inside the box were inaccessible unless someone chose to stick his hand inside the box through the box opening that was "cracked two inches" (Tr. 51).

There is nothing in the standard that supports the respondent's assertion that a temporary connection or use of a power cable is permissible, and that the standard only applies to a permanently wired cable which enters an electrical box. The standard simply makes no such distinctions. I believe that one may reasonably assume that the lid or door which was provided on the electical box in question was there to insure that the lid or door was kept tightly closed to prevent persons from contacting the wires inside the box or to prevent damage to the wires. It is clear from the evidence in this case that the lid or door was not completely closed, and that the cord did not enter the box through proper fittings or holes with insulated bushings. Under the circumstances, I conclude and find that the petitioner has established a violation of section 55.12-8, and the citation IS AFFIRMED.

History of Prior Violations

The petitioner has stipulated that the respondent has never been issued prior citations (Tr. 6), and I have taken this into account in assessing the civil penalty for the citation in question in this case.

Size of Business and the Effect of the Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The evidence of record in this case supports a conclusion that the respondent is a small independent contractor subject to the Act. I further conclude and find that the civil penalty assessed for the violation in question will not adversely affect the respondent's ability to continue in business.

Negligence

Although the respondent asserted that it had connected the cable in question the same way on many prior occasions, this is no defense to the question of negligence. I conclude that the violation resulted from the respondent's failure to exercise reasonable care, and that this amounts to ordinary negligence.

Gravity

The testimony and evidence in this case establishes that the violation occurred in an isolated area of the plant, and that the only persons possibly exposed to any hazard were qualified and trained electricians. I find that the possibility of any injury by anyone coming in contact with the electrical box in question was unlikely and remote. Assuming that contact was made, the respondent's unrebutted testimony is that the cable in question was an approved heavy duty cable which was well-insulated. Further, the cable was not in use, and the inspector observed no one in the area where it was connected. Under these circumstances, I conclude and find that the violation was non-serious.

Good Faith Compliance

The record establishes that abatement was achieved within a half-an-hour of the issuance of the citation. Mr. Roberts stated that his superintendent advised him that the cited condition was corrected before Inspector McGregor left the mine on the day the citation was issued (Tr. 10-11). I conclude and find that the respondent achieved rapid good faith compliance.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of

the Act, I conclude that a $20 civil penalty assessment for the violation in question is appropriate and reasonable in this case.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $20, within thirty (30) days of the date of this decision. Payment is to be made to MSHA, and upon receipt of same, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Chandra V. Fripp, Esq., Office of the Solicitor, U.S. Department of Labor, 555 Griffin Square, Suite 501, Dallas, TX 75202 (Certified Mail)

Mr. William V. Roberts, Jr., President, Bill Roberts, Inc., P.O. Box 1294, 2500 L & A Road, Metairie, LA 70004 (Certified Mail)

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OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

KEYSTONE COAL MINING CORP., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 84-193-R Citation No. 9951311; 6/20/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Urling No. 3 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 85-29 A.C. No. 36-05658-03541
v.	:	Urling No. 3 Mine
KEYSTONE COAL MINING CORP., Respondent	:	

DECISION

Appearances: James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Secretary of Labor; William M. Darr, Esq., Indiana, Pennsylvania, for Keystone Coal Mining Corp.

Before: Judge Broderick

On July 9, 1985, I issued a Tentative Decision in this case and gave the parties the opportunity to file objections or arguments before I issued a Final Decision. 1/ After

1/ The Secretary "objects" to my issuance of a Tentative Decision in this case and cites "Administrative Procedure Act Rule 8(b)" to show that it was improper. The Tentative Decision was issued in this case to permit the Secretary to fully argue his position before a Final Decision was issued. See Administrative Procedure Act, 5 U.S.C. § 557 (b) and (c).

an extension of time, both parties have filed post hearing briefs. I have considered again the entire record in this case and the contentions of the parties, and conclude that the Tentative Decision of July 9, 1985 should issue as my Final Decision in this case. The Tentative Decision is attached hereto and made a part of the Final Decision. Keystone is ORDERED to pay within 30 days of the date of this decision the sum of $1100 as penalties for the violations charged in the two citations.

James A. Broderick
Administrative Law Judge

Distribution:

William M. Darr, Esq., 655 Church Street, Indiana, PA 15701 (Certified Mail)

James B. Crawford, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

slk

ATTACHMENT

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

July 9, 1985

KEYSTONE COAL MINING CORP., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 84-193-R Citation 9951311; 6/20/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Urling No. 3 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 85-29 A.C. No. 36-05658-03541
v.	:	Urling No. 3 Mine
KEYSTONE COAL MINING CORP., Respondent	:	

TENTATIVE DECISION

The following decision is issued subject to the right of the parties to file objections or argument with me within 20 days from the date of its issuance.

STATEMENT OF THE CASE

The contest proceeding involves a challenge to a citation issued for a violation of 30 C.F.R. § 70.100. The civil penalty proceeding seeks a penalty for the violation charged in that citation and for another violation charged in a withdrawal order. Pursuant to notice the case was called for hearing in Pittsburgh, Pennsylvania on June 4, 1985. The parties proposed to settle the violation charged in the withdrawal order by the payment of the penalty originally assessed, $650. I stated on the record that I would approve the settlement. With respect to the contested citation, the operator conceded that the violation occurred, but contested the special finding that it was caused by the operator's unwarrantable failure to comply with the standard.

Paul S. Parobeck, Robert Davis, Paul Bizich, Jr. and George M. Szalankiewicz testified on behalf of the Secretary. Raymond Wygonik and Dennis Malcolm testified on behalf of Keystone. At the conclusion of the hearing, I stated on the record that I concluded that the evidence did not establish that the violation was caused by Keystone's unwarrantable failure to comply with the standard.

ISSUES

1. Was the violation the result of Keystone's unwarrantable failure to comply with the standard?

2. What is the appropriate penalty for the violation?

FINDINGS AND CONCLUSIONS

I have considered the entire record and the contentions of the parties in making the following decision.

The parties stipulated that Keystone is subject to the Mine Safety Act and that I have jurisdiction over the parties and the subject matter of this proceeding. Keystone is a "medium to large" operator, producing over 6 million tons of coal annual, 557,000 at the subject mine. The imposition of a penalty in this case will have no effect on Keystone's ability to continue in business. In the 24 months prior to the citation being considered here, Keystone had a history of more than 1700 violations, including 66 violations of respirable dust standards. This is a significant history of prior violations and the penalty hereafter assessed will reflect that fact. The parties agreed that the violation charged in the contested citation occurred. It was terminated promptly in good faith.

UNWARRANTABLE FAILURE

Keystone's Dust Control Plan requires that a minimum of 3200 cubic feet of air be maintained at the end of the line brattice, and a minimum of 9000 cubic feet at the last open crosscut. Fourteen water sprays (later increased to 16) operating at 60 psi were required. Keystone and its affiliated companies have been leaders in developing the fan spray system for removing respirable dust.

Technical inspections were carried out on June 1, 1983, on November 14, 1983 and on October 17, 1984. The quantity of air at the end of the line curtain varied from 3540 to 4430 cubic feet. Dust samples collected ranged from 0.1 to 1.1 mg/m3. These inspections demonstrated that the plan was

more than adequate in controlling respirable dust. Despite this fact, however, dust samples submitted by Keystone for the designated occupation 036 for the MMV section showed that it was out of compliance during the following bi-monthly sampling periods:

May-June 1983	2.2 mg/m3
July-Aug. 1983	2.7 mg/m3
Nov.-Dec. 1983	2.6 mg/m3
Jan.-Feb. 1984	3.1 mg/m3

In each case compliance was effected and the citations terminated when secondary samples were taken. The samples submitted for September-October 1983 showed an average of 1.7 mg/m3, and for March-April 1984 showed an average of 1.7 mg/m3.

Five samples taken on May 23, 24 and 25, 1984 showed the following MRE equivalents: 1.1, 2.5, 3.3, 0.5 and 4.0. The average concentration was thus 2.2 mg/m3, exceeding the allowable limits under 30 C.F.R. § 70.100. When the computer printout was received, showing these concentrations, a citation was prepared and taken to the mine by MSHA Inspector Paul Bizich, Jr. Inspector Bizich was directed to serve the citation and make a spot inspection including sampling the section in question. However, the section was idle that day and for the 2 previous days. The inspector talked to the mine superintendent and the section foreman who both said the dust control plan had been followed. The inspector then requested the superintendent to voluntarily increase the requirements of the dust control plan. Superintendent Wygonik replied that he could not agree to this without consulting others. The inspector concluded that the fact that the unit had been out of compliance five times in the past 12 months (actually 14 months) indicated a lack of concern on the part of Keystone. He therefore found that the violation was due to the operator's unwarrantable failure and issued a citation under section 104(d)(1) of the Act. The citation was terminated on June 28, 1984 when the operator submitted 5 valid samples with an average concentration of 0.6 mg/m3.

Keystone was equipped and staffed to take and analyze dust samples itself, but did not do so between May 1983 and June 1984.

After the citations were issued in 1983 and early 1984, Keystone checked the sprays, the curtains and the mining machine. Maintenance people and technical support people

were called in but found no problems with the equipment and could find no evidence that the dust control plan was not being followed. However, two miner operators expressed suspicions of the dust sampling program because they felt it might affect their rights to obtain black lung benefits.

Keystone measures the air at the end of the line curtain and at the last open crosscut every shift. It checks the water sprays every shift, and checks the water spray pressure occasionally. A dust technician gives annual refresher training to the miners during which he stresses the importance of the ventilation and dust control plan.

In the case of Zeigler Coal Co., 7 IBMA 280, 295-96 (1977) the Interior Board of Mine Operation Appeals stated that a violation is unwarrantable if the operator "has failed to abate the conditions or practices constituting [the] violation . . . [when it] knew or should have known existed or which it failed to abate because of a lack of reasonable care." In the case of United States Steel Corporation, 6 FMSHRC 1423 (1984), the Commission alluded to the Board's definition in Zeigler and stated that although it was not required "to examine every aspect of the Zeigler construction," it concurred with the Board "to the extent that an unwarrantable failure to comply may be proved by showing that the violative condition or practice" resulted from "indifference, willful intent, or a serious lack of reasonable care." (1437)

There is no evidence in this record that Keystone knew that the conditions constituting the violation cited here existed, and I conclude that it did not. Should it have known that such conditions (i.e., respirable dust in excess of 2.0 mg/m3) existed prior to the issuance of the citation? Since the plan was adequate to keep the dust level within allowable limits, MSHA concludes that it was not being followed. But Keystone has shown that it regularly checked the air and water spray systems, and that it had a regular program for training and retraining the miners concerning the ventilation and dust control plans. In January, 1984, and March, 1984, MSHA requested that it monitor the sampling program and Keystone agreed. However, the proposed monitoring was not done. In view of these facts, I cannot conclude that the violation resulted from indifference, willful intent or a serious lack of reasonable care. Nor (though this is a closer question) can I conclude that Keystone "should have known" that the condition existed. MSHA argues that the fact that Keystone had four prior violations establishes that it should have known of the violation charged here. This does not follow. There is no

evidence that Keystone did anything or failed to do anything which would have put it on notice that the dust limits were exceeded in May, 1984. Therefore, I conclude that the violation did not result from the unwarrantable failure of Keystone to comply with the respirable dust standard. Therefore, the citation was improperly issued under section 104(d)(1), and should be modified to a 104(a) citation.

PENALTY

Exposure to more than 2.0 mg/m3 of respirable dust over the working life of a miner is likely to result in coal miner's pneumoconiosis or black lung. This is a serious disease, and can result in disability and early death. The Coal Act of 1969 and the Mine Act of 1977 were both passed in part to deal with the serious problem of overexposure to coal dust. I conclude that the violation was serious. It was promptly terminated in good faith. The operator is medium large and has a significant history of prior violations. I conclude that, considering the criteria in section 110(e) of the Act, an appropriate penalty for the violation is $450.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

(1) Citation 9951311 issued June 20, 1984, under section 104(d)(1) is MODIFIED to delete the finding that the violation was caused by the operator's unwarrantable failure to comply with the standard. The citation therefore is converted to one issued under section 104(a).

(2) Keystone shall pay the following penalties for the violations charged in this proceeding:

Citation 2252764		$ 650
Citation 951311		450
	Total	$1100

(3) The parties are granted 20 days from the date of issuance of this tentative decision to file objections thereto or arguments thereon.

James A Broderick

James A. Broderick
Administrative Law Judge

Distribution:

William M. Darr, Esq., 655 Church Street, Indiana, PA 15701
(Certified Mail)

James B. Crawford, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203
(Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 84-216 A.C. No. 36-02405-03572
v.	:	Greenwich Collieries No. 1 Mine
PENNSYLVANIA MINES CORP., Greenwich Collieries Division, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On September 23, 1985, the Secretary of Labor filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at $4,250 and the parties propose to settle for $1,500.

Two orders and one citation are involved in this docket. One order and one citation have been contested in separate dockets (PENN 84-151-R and PENN 84-152-R). The contested orders and citation were issued about 6 weeks following an explosion at the mine which was closed by a 103(k) order. The 103(k) order required that in the event any hazard was found, a plan would be submitted to MSHA for corrective action. As of April 3, 1984, modifications had been permitted pursuant to such plans about 40 times. On that date a mapping team encountered an explosive mixture of methane which was corrected by the installation of curtains. A plan was not submitted or approved, although an MSHA task force member was aware of the hazard, and understood that it would be corrected by mine management. The foreman who corrected the condition was acting in good faith, but because a plan was not submitted for approval, a citation was issued for a violation of section 103(k) of the Act. It was originally assessed at $2,000, and the parties propose to settle for payment of $800.

An order was issued under section 104(d)(1) on April 5/6, 1984 charging a violation of 30 C.F.R. § 75.324 because two

company foremen observed a hazardous condition and corrected it without recording the findings and action in the mine examiner's book. However it was recorded in the mine foreman's book. It is further noted that the foremen did not initially observe the condition but were informed of it by the mapping team referred to above. The violation was originally assessed at $1,500. The parties propose to settle for $200. The violation charged in the other order not separately contested is of 30 C.F.R. § 75.317 because a flame safety lamp was not disassembled, cleaned, serviced and tested before it was used underground. The violation was originally assessed at $750 and the parties propose to settle for $500.

Respondent is a medium to large operator with an average history of prior violations. The violations were abated in good faith.

I have considered the violations charged in the orders and citation and the information contained in the motion in the light of the criteria in section 110(i) of the Act. I conclude that the proposed settlement will effectuate the purposes of the Act and should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of $1,500 within 30 days of the date of this order.

James A Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Joseph T. Kosek, Esq., Greenwich Collieries, P.O. Box 367, Ebensburg, PA 15931 (Certified Mail)

Edward Fitch, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 16 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 85-145
	:	A.C. No. 36-07524-03502
v.	:	
	:	Lytle Strip Mine
LATROBE MINING COMPANY, INCORPORATED, Respondent	:	

DECISION

Appearances: James E. Culp, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of $300 for an alleged violation of 30 C.F.R. § 48.28(a), because of the asserted failure by the respondent to give annual refresher training to two of its miners. The two affected miners are Donald Lupyan, the mine operator, and Kevin Fodor, a mine employee. They were the only two full-time mine employees working at the mine, and according to the inspector, an occasional part-time employee was hired by Mr. Lupyan as required.

The respondent contested the violation and requested a hearing. Pursuant to notice, a hearing was convened in Pittsburgh, Pennsylvania on August 29, 1985, and while the petitioner appeared, the respondent did not. In view of the respondent's failure to appear, the hearing proceeded without him. For reasons discussed later in this decision, respondent is held to be in default, and is deemed to have waived his opportunity to be further heard in this matter.

small stockpile of coal, and rusty equipment simply parked by a trailer which serves as the mine office. These observations led him to conclude that active mining was not taking place. Mr. Hill also indicated that the land owner had advised him that someone had visited the site to sow some seed, but that strip mining was not taking place. Mr. Hill confirmed that the respondent has filed no changes to the mine legal identity form, and that as far as MSHA is concerned, Mr. Lupyan is still considered the legal operator of the mine for MSHA's enforcement purposes.

Inspector Hill testified that at the time of his inspection, Mr. Lupyan and Mr. Fodor were constructing a surface silt pond with bulldozers. They were digging a hole approximately 20 feet deep. They were within 50 feet of the highwall, and he believed that prior work that they had performed would necessarily bring them close to the highwall. Since the surface strip mine in question was above an old abandoned underground mine, those miners working on the surface have to be aware of the terrain and possible surface cracks. Without the proper training, they may be unaware of these and possibly other hazards.

Mr. Hill testified that during his inspection he asked Mr. Lupyan and Mr. Fodor if they had completed their annual training, and when they indicated that they had, he asked to see their training certificates. The certificates they produced were dated September 19, 1983, and since they were outdated and Mr. Lupyan and Mr. Fodor could produce no evidence that they had received training during the past year, he issued the citation. He also issued a withdrawal order pursuant to section 104(g)(1) of the Act (Exhibit 2).

Mr. Hill confirmed that he abated the citation the day after it was issued after Mr. Lupyan and Mr. Fodor produced new training certificates indicating that they had received their annual refresher training.

Findings and Conclusions

Respondent's Failure to Appear at the Hearing

The record in this case reflects that the initial Notice of Hearing was mailed to the respondent at his address of record by certified mail on July 10, 1985. The Amended Notice of Hearing advising the respondent of the specific hearing location was similarly mailed on August 13, 1985. However, the postal service registered return receipt cards

were not returned, nor have the notices of hearing been returned as undeliverable.

Petitioner's counsel stated at the hearing that he had attempted to contact Mr. Lupyan on several occasions, both at his residence and at the mine telephone number listed on his records. In each instance, Mr. Lupyan was unavailable and did not return any of counsel's calls or otherwise respond to the messages left for him. Counsel also indicated that he had written to Mr. Lupyan concerning the case but received no response (Tr. 8).

On August 26, 1985, I placed a telephone call to the respondent's mine at the number listed in the file. An answering service (Renee) advised me that Mr. Lupyan was not available. I left a message detailing the date, time, and place of the hearing, and the answering service assured me that the message would be passed on to Mr. Lupyan.

On Thursday morning, August 29, 1985, at approximately 10:00 a.m., and prior to the commencement of the hearing, I placed a telephone call to the respondent's mine and spoke with an individual who identified himself as Mr. Hanley. He advised that he was the caretaker, and informed me that he was not employed by the respondent and had no connection with his mining operation. He also informed me that Mr. Lupyan has not picked up the mail which has been accumulating at the mine, and that the mine is not producing any coal. He explained further that Mr. Lupyan is no longer the president of Latrobe Mining Company, and he identified the new president as a Mr. Paul Shaw. Mr. Hanley also advised me that there was no one at the property that could give me any information and he knew absolutely nothing about the hearing (Tr. 6-7)..

In the case of Secretary of Labor v. Little Sandy Coal Sales, Inc., 5 FMSHRC 313, March 28, 1985, the Commission held that a pro se mine operator who fails to appear at a hearing pursuant to notice must be given an opportunity to cross-examine witnesses presented by MSHA even though the presiding judge subsequently accepted his excuse for not appearing but simply gave him an opportunity to present a statement in support of his case. Upon review of that decision, I find that the factual basis for the defaults differ. In Little Sandy, the mine operator attempted to communicate his inability to appear to the judge in advance of the hearing, the case involved a novel question of jurisdiction, and the Commission viewed it as a "test case" concerning the applicability of the Act to the respondent's mining operation.

Given these circumstances, the Commission was of the view that defaulting the operator without giving him an opportunity to fully present his defense by cross-examining MSHA's witnesses was inappropriate. I find no such circumstances presented in the instant case, and I conclude that Little Sandy does not apply.

In the instant case, the respondent contested the proposed assessment, and by letter to the Commission dated April 10, 1985, he requested a hearing. Since that time, he has not been heard from. The respondent has failed to respond to a number of communications made by MSHA's counsel, and he has apparently opted to ignore the notices of hearing served pursuant to the Commission's rules. Under the circumstances, I conclude and find that he has waived his right to be heard further in this matter and that he is in default.

Although Commission Rule 29 C.F.R. § 2700.63, calls for the issuance of a show-cause order before a party is defaulted, given the facts of this case where the respondent has completely failed to respond or otherwise communicate with me or trial counsel with respect to my hearing notices, I conclude that the issuance of such an order would be an exercise in futility.

Fact of Violation

I conclude and find that the petitioner has established a violation of 30 C.F.R. § 48.28-(a), by a preponderance of the evidence. The testimony of Inspector Hill fully supports the citation which he issued, and IT IS AFFIRMED.

Mr. Hill testified that the two miners in question were observed working near a highwall with a bulldozer, and he was concerned that their lack of training with respect to the recognition of hazards with respect to the old underground mine may have exposed them to surface cracks and other hazards. Given the lack of training, he concluded that it was reasonably likely that the miners would in the course of their work in the construction of the silt pond in question encounter unrecognized hazards, thereby exposing them to possible harm. For these reasons, he concluded that the violation was "significant and substantial." I find the inspector's testimony credible, and I agree with his finding. Accordingly, his "S&S" finding IS AFFIRMED.

Negligence

Inspector Hill stated that the violation resulted from the respondent's moderate negligence. Since the respondent had an approved training plan, it should have been aware of the fact that annual refresher training was required of all employees. The plan covers the types of hazards that one could encounter at a strip mine (Exhibit 4). I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Gravity

Inspector Hill testified that both Mr. Lupyan and Mr. Fodor were experienced miners. However, since they were working in an area near the highwall where the rock strata was broken, this could affect the stability of the highwall. Under the circumstances, and since they had not received recent refresher training, they may not have been alerted to these potential hazards. Mr. Hill believed that it was reasonably likely that the lack of training in recognizing such hazards could have resulted in an accident. I find that this violation was serious.

History of Prior Citations

Inspector Hill confirmed that the respondent has no history of prior citations, and I adopt this as my finding on this issue.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Remain in Business

Inspector Hill testified that the respondent's strip mining operation was small and that the mine had only two employees, namely the owner Mr. Lupyan and Mr. Fodor. The mine operated on one shift, 5 to 6 days a week, and produced approximately 30 tons a day.

I conclude and find that the respondent is a small operator. However, since Mr. Lupyan failed to appear at the hearing, I cannot conclude that the penalty assessed will adversely affect his ability to continue in business.

Good Faith Compliance

The record establishes that Inspector Hill fixed the abatement time as October 5, 1984, 3 days after the citation

was issued. He testified that when he returned to the mine the day after he issued the citation, Mr. Lupyan and Mr. Fodor produced new training certificates indicating that they had received the required training. Accordingly, I find that the respondent exercised good faith in rapidly abating the citation.

Civil Penalty Assessment

The violation in this case was "specially assessed" by MSHA's Office of Assessments at $300. Although the respondent had an opportunity to appear at the hearing and present mitigating circumstances on his behalf, he failed to do so. Normally, this would warrant an affirmation of the proposed penalty filed by the petitioner. However, in this case, I have taken into account the fact that the respondent a very small operator (himself and one other full time miner), that he has no prior history of violations, and that he achieved rapid abatement. I have also considered the fact that it would appear from the record here that he is no longer in business, and that when he was, his coal production was limited, and his mining operation was marginal at most. Under the circumstances, I conclude that a civil penalty assessment of $100 is reasonable for the violation in question.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $100, for the violation in question, and upon receipt of payment by the petitioner, this case is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

James E. Culp, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Mr. Donald E. Lupyan, President, Latrobe Mining Company, Incorporated, P.O. Box 568, Latrobe, PA 15650 (Certified Mail)

fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 18 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 85-95
	:	A.C. No. 46-01437-03574
v.	:	
	:	McElroy No. 10 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. Respondent has agreed to pay the proposed penalty of $20 in full. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The citation in this case is based on essentially the same facts as in case Docket No. WEVA 85-151-D for which Respondent has paid a civil penalty of $600.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $20 within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Karl T. Skrypak, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 22 1985

DONALD C. BEATTY, JR., Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. PENN 84-205-D
v.	:	
	:	Lucerne No. 8 Mine
HELVETIA COAL COMPANY, Respondent	:	

DECISION

Appearances: Earl R. Pfeffer, Esq., Washington, D.C. for Complainant; William M. Darr, Esq., Indiana, Pennsylvania for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This case involves issues similar to those in the case of Rocco Curcio v. Keystone Coal Mining Corporation, decided by me on September 27, 1985. The two mine operators are related companies, and counsel for Complainant and Respondent are the same. The cases were briefed together.

Complainant in this case contends that he was discriminated against in violation of the Act when he was charged with an unexcused absence from work for attending an MSHA manager's conference on April 6, 1984. The case was heard in Indiana, Pennsylvania on May 15, 1985. Donald C. Beatty, Jr., Thomas Grove, and Robert J. Schork testified on behalf of Complainant. Robert G. Smith, Kenneth J. Levits and Edward J. Onuscheck on behalf of Respondent. Both parties have filed post-hearing briefs.

FINDINGS OF FACT

There is no important dispute as to the facts in this case. Respondent was the owner and operator of the Lucerne No. 8 Mine, an underground mine, in Pennsylvania. Complainant was a miner at the subject mine, and a member of the health and safety committee at the mine beginning in May 1983.

The MSHA District Manager called a conference for April 6, 1984 to review eight citations which had been issued to Helvetia. A day or two prior to the conference, Complainant told Robert Smith, Mine Superintendent, that he was going to attend the conference. Smith told him that if he missed work he would be given an unexcused absence. The other two members of the committee intended to attend the conference, but, because of their schedules, were not required to miss time from work.

Respondent was concerned beginning in 1983 about the problem of employee absenteeism caused by union business. On February 27, 1984, Respondent's Vice President of Operations wrote to the President of UMWA District 2, complaining that the "time lost from work for Union business has come from almost no time in the past to a point of now where it is ridiculous at some Locals." The subject was also raised at company-union communication committee meetings.

The District conference was attended by all three safety commitee members and lasted from about 9:00 a.m. until noon. Complainant was scheduled to work from 8:01 a.m. and did not report at all. One other committeeman was off, and the third was scheduled to and did work from 12:01 a.m. to 8:00 a.m. Six of the eight citations discussed at the conference were issued by inspectors accompanied by Complainant. Complainant received an unexcused absence for missing work on April 6, 1984.

Article XXII of the National Bituminous Coal Wage Agreement of 1981 provides in part that if an employee accumulates 6 single days of unexcused absence in a 180-day period or 3 single days in a 30-day period, he shall be designated an "irregular worker" and will be subject to discipline. If an employee is absent for 2 consecutive days without consent, other than for illness, he may be discharged. Article IX provides that an employee is entitled to 5 days absence for sickness, accident, emergency or personal business. Each employee is also entitled to a graduated vacation of up to 13 days per year depending on his or her length of continuous service (Art. XIV).

During 1983, the safety committee members attended four MSHA District Manager Conferences. None of them was charged with an unexcused absence for any of these days. Charging Complainant with an unexcused absence in this case was either "an about face" (Complainant's brief) or "a reinvocation of [a previous] policy" (Respondent's brief).

MSHA District Manager's Conferences are called pursuant to 30 C.F.R. § 100.6, and representatives of the miners are notified of the conferences and permitted to participate. The 3 safety committee members here work in different sections of the mine and have different mining backgrounds.

ISSUES

1. Did Complainant's attendance at the MSHA Manager's Conference and his absence from work constitute protected activity under the Mine Act?

2. If so, did Respondent's act in charging him with an unexcused absence, constitute adverse action for such protected activity?

CONCLUSIONS OF LAW

Complainant and Respondent are subject to and protected by section 105 of the Act, the former as a miner and a representative of miners, the latter as a mine operator.

PROTECTED ACTIVITY

I conclude, following the principles enunciated in Curcio v. Keystone Mining Co., ___ FMSHRC ____ (issued September 27, 1985), that Complainant's attendance at the MSHA District Manager's conference was protected activity under the Act. The Act contemplates that miners and especially their representatives take an active role in the effort to make the nation's mines safer places to work. The Act provides (Section 103) that a representative of the miners shall be given the opportunity to accompany the inspector during his inspection and to participate in pre- or post-inspection conferences at the mine. The representative is protected from loss of pay during his participation in the inspection. A miners' representative may request inspections of the mine if he has reasonable grounds to believe that a violation or imminent danger exists. I conclude that it is important for safety reasons that the representatives participate in manager's conferences and that such participation, subject to the limitations that it be reasonable and undertaken in good faith, may not be penalized by the mine operator. See Secretary/Truex v. Consolidation Coal Company, __FMSHRC ___ (issued September 20, 1985), Judge Gary Melick.

ADVERSE ACTION

For the reasons given in my decision in Curcio, supra, I conclude that the penalty imposed by Respondent herein -- the

The activity found to be protected resulted in the action found to be adverse. Therefore, I conclude that Respondent violated section 105(c) of the Act.

RELIEF

Therefore, IT IS ORDERED:

1. The unexcused absence assessed against claimant on April 6, 1984 shall be removed from his employment record, and his absence shall be deemed excused.

2. Respondent shall cease and desist from enforcing its absentee program against safety committee members in a manner that limits their reasonable participation in MSHA District Manager conferences concerning citations issued at the mine.

3. Respondent shall pay the costs and expenses (including attorney's fees) reasonably incurred by Complainant in connection with the institution and prosecution of this proceeding.

4. Counsel are directed to confer and attempt to agree on the amount due under paragraph 3 above, and if they can agree, to submit a statement thereof to me within 20 days of the date of this decision. If they cannot agree, Complainant shall, within 30 days of the date of this decision, file a detailed statement of the amount claimed, and Respondent shall submit a reply thereto within 20 days thereafter. This decision shall not be final until I have issued a supplemental decision on the amount due under paragraph 3.

5. Respondent shall post a copy of this decision on a bulletin board at the subject mine which is available to all employees, and it shall remain there for a period of at least 60 days.

James A. Broderick

James A. Broderick
Administrative Law Judge

Distribution:

Earl R. Pfeffer, Esq., United Mine Workers of America, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

William M. Darr, Esq., Helvetia Coal Company, 655 Church Street, Indiana, PA 15701 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 22, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF PHILLIP CAMERON, Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEVA 82-190-D MORG CD 82-3 Ireland Mine
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION
ORDER OF RELIEF

Appearances: Covette Rooney, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania for Complainant, Phillip Cameron; Robert M. Vukas, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania for Respondent, Consolidation Coal Company.

Before: Judge Merlin

This case is now before me pursuant to the Commission's decision of remand dated March 28, 1985 (7 FMSHRC 319). The operator appealed the Commission's decision, but the Court of Appeals dismissed the appeal on July 17, 1985. Thereafter, the parties advised me that they did not believe a further evidentiary hearing was required and on August 13, 1985, I ordered them to file additional briefs on or before October 1, 1985 setting forth their positions in light of the Commission's decision. The operator and the Solicitor have filed briefs but the union has not.

The facts of this case are fully set forth in both my original decision dated December 13, 1982 (4 FMSHRC 2205) and the Commission's remand. Briefly, the complainant was a haulage motorman on a lead locomotive pulling 10 to 12 mine cars of coal. Until the time in question he used a safety switch to derail detached cars and prevent a runaway. The operator changed this procedure so that instead of the safety switch there would be a 10-ton trailing locomotive at the back of the trip to act as a brake if any of the cars should uncouple. The complainant refused to run the lead locomotive because he believed this procedure would be dangerous to his co-worker on the trailing locomotive. 4 FMSHRC at 2209-2210.

In my original decision I concluded that the complainant's belief was in good faith and reasonable, stating as follows:

> * * * In determining the honesty and reasonableness of the complainant's belief, I find relevant the fact that the procedure for using a 10-ton trailing locomotive on a trip of mine cars such as the complainant drove was new and had not been done previously in this mine. Despite his experience as a motorman the complainant therefore, had never been confronted with this precise situation. Moreover, there were some grades over which the mine trip had to travel which reasonably could be expected to add to his concern (Tr. 23-24). The MSHA inspector testified that until the test was performed, he did not know whether the trip would hold (Tr. 266). After weighing all the evidence I determine that the record supports the complainant's position that his belief about the safety hazard was in good faith and was reasonable. 4 FMSHRC at 2211.

After again reviewing the record I adhere to conclusions expressed above. I also note and accept the complainant's statement that he would worry about anyone on the trailing locomotive under the operator's new procedures (Tr. 118). The complainant's fears were undoubtedly heightened in the case of Mr. Aston because Aston was not experienced, but I conclude that the complainant's reasonable, good faith belief concerned the procedure itself with respect to anyone who would be assisting him by riding on the trailing locomotive.

In its decision the Commission ruled that under certain circumstances a miner's refusal to work can be protected under the Act where he himself is not in danger but another miner is, holding in this respect as follows:

> * * * Therefore, we hold that a miner who refuses to perform an assigned task because he believes that to do so will endanger another miner is protected under section 105(c) of the Mine Act, if, under all the circumstances, his belief concerning the danger posed to the other miner is reasonable and held in good faith. Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1418 (June 1984), citing Secretary on behalf of Robinette v. United Castle Co., 3 FMSHRC at 807-12. We emphasize, however, the need for a direct nexus between performance of the refusing miner's work assignment and the feared resulting injury to another miner. In other words, a miner has the right to refuse to perform his work if such refusal is necessary to prevent his personal participation in the creation of a danger to others. Of course, as with other work refusals, it is necessary that the miner, if possible, "communicate, or at least attempt to communicate, to some

> representative of the operator his belief in the . . . hazard at issue," Sammons v. Mine Services Co., 6 FMSHRC 1391, 1397-98 (June 1984) (emphasis added), quoting Secretary on behalf of Dunmire and Estle v. Northern Coal Co., supra, 4 FMSHRC at 133, and that the refusal not be based on "a difference of opinion -- not pertaining to safety considerations -- over the proper way to perform the task at hand." Sammons, 6 FMSHRC at 1398.
>
> 7 FMSHRC at 324.

As already set forth, I have concluded that the complainant's belief was reasonable and held in good faith. I further conclude that there was a direct nexus between the complainant's operation of the lead locomotive which he refused to run and the danger which he feared would result to his co-worker on the trailing locomotive. Evidence of record indicating that there were areas of bad track and steep grades is accepted (Tr. 23, 24). As the operator of the lead locomotive the complainant might misjudge grades and/or speeds, thereby causing or contributing to an uncoupling which would place the man on trailing locomotive in danger (Tr. 119, 153). Also, in the event of an uncoupling on a grade, the complainant, as operator of the lead locomotive could cut his motor off from the rest of the trip, saving himself but again jeopardizing the man on the trailing locomotive (Tr. 93-95). Thus, the complainant's expressed fear that he could cause injury or death to the man on the trailing locomotive is well founded (Tr. 103, 120). In other words, the complainant would personally participate in the creation of the danger to the other motorman. Finally, as my first decision sets forth in detail, the complainant communicated his belief in the hazard to all levels of mine management including the section foreman, shift foreman, safety supervisor and mine superintendent. 4 FMSHRC at 2206-2207.

In light of the foregoing, I determine that all the requirements of the Commission's decision have been satisfied and that this complaint should be granted.

Accordingly, it is Ordered that:

(1) the operator vacate the suspension and remove it from the complainant's employment record;

(2) the operator pay the complainant for the days he was suspended together with interest computed thereon in accordance with applicable Commission decisions and any expenses reasonably incurred by complainant in connection with the institution and prosecution of this case. These amounts should be readily ascertainable by the Solicitor and operator's counsel without difficulty.

(3) the operator post a copy of this decision on a bulletin board at the subject mine which is available to all employees, where it shall remain for a period of at least 60 days.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Covette Rooney, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Robert M. Vukas, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

[illegible] 24 1985

DONALD C. BEATTY, JR., Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. PENN 84-205-D
v.	:	
	:	Lucerne No. 8 Mine
HELVETIA COAL COMPANY, Respondent	:	

CORRECTED DECISION

Appearances: Earl R. Pfeffer, Esq., Washington, D.C. for Complainant; William M. Darr, Esq., Indiana, Pennsylvania for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

This case involves issues similar to those in the case of Rocco Curcio v. Keystone Coal Mining Corporation, decided by me on September 27, 1985. The two mine operators are related companies, and counsel for Complainant and Respondent are the same. The cases were briefed together.

Complainant in this case contends that he was discriminated against in violation of the Act when he was charged with an unexcused absence from work for attending an MSHA manager's conference on April 6, 1984. The case was heard in Indiana, Pennsylvania on May 15, 1985. Donald C. Beatty, Jr., Thomas Grove, and Robert J. Schork testified on behalf of Complainant. Robert G. Smith, Kenneth J. Levits and Edward J. Onuscheck on behalf of Respondent. Both parties have filed post-hearing briefs.

FINDINGS OF FACT

There is no important dispute as to the facts in this case. Respondent was the owner and operator of the Lucerne No. 8 Mine, an underground mine, in Pennsylvania. Complainant was a miner at the subject mine, and a member of the health and safety committee at the mine beginning in May 1983.

The MSHA District Manager called a conference for April 6, 1984 to review eight citations which had been issued to Helvetia. A day or two prior to the conference, Complainant told Robert Smith, Mine Superintendent, that he was going to attend the conference. Smith told him that if he missed work he would be given an unexcused absence. The other two members of the committee intended to attend the conference, but, because of their schedules, were not required to miss time from work.

Respondent was concerned beginning in 1983 about the problem of employee absenteeism caused by union business. On February 27, 1984, Respondent's Vice President of Operations wrote to the President of UMWA District 2, complaining that the "time lost from work for Union business has come from almost no time in the past to a point of now where it is ridiculous at some Locals." The subject was also raised at company-union communication committee meetings.

The District conference was attended by all three safety commitee members and lasted from about 9:00 a.m. until noon. Complainant was scheduled to work from 8:01 a.m. and did not report at all. One other committeeman was off, and the third was scheduled to and did work from 12:01 a.m. to 8:00 a.m. Six of the eight citations discussed at the conference were issued by inspectors accompanied by Complainant. Complainant received an unexcused absence for missing work on April 6, 1984.

Article XXII of the National Bituminous Coal Wage Agreement of 1981 provides in part that if an employee accumulates 6 single days of unexcused absence in a 180-day period or 3 single days in a 30-day period, he shall be designated an "irregular worker" and will be subject to discipline. If an employee is absent for 2 consecutive days without consent, other than for illness, he may be discharged. Article IX provides that an employee is entitled to 5 days absence for sickness, accident, emergency or personal business. Each employee is also entitled to a graduated vacation of up to 13 days per year depending on his or her length of continuous service (Art. XIV).

During 1983, the safety committee members attended four MSHA District Manager Conferences. None of them was charged with an unexcused absence for any of these days. Charging Complainant with an unexcused absence in this case was either "an about face" (Complainant's brief) or "a reinvocation of [a previous] policy" (Respondent's brief).

MSHA District Manager's Conferences are called pursuant to 30 C.F.R. § 100.6, and representatives of the miners are notified of the conferences and permitted to participate. The 3 safety committee members here work in different sections of the mine and have different mining backgrounds.

ISSUES

1. Did Complainant's attendance at the MSHA Manager's Conference and his absence from work constitute protected activity under the Mine Act?

2. If so, did Respondent's act in charging him with an unexcused absence, constitute adverse action for such protected activity?

CONCLUSIONS OF LAW

Complainant and Respondent are subject to and protected by section 105 of the Act, the former as a miner and a representative of miners, the latter as a mine operator.

PROTECTED ACTIVITY

I conclude, following the principles enunciated in Curcio v. Keystone Mining Co., ___ FMSHRC ____ (issued September 27, 1985), that Complainant's attendance at the MSHA District Manager's conference was protected activity under the Act. The Act contemplates that miners and especially their representatives take an active role in the effort to make the nation's mines safer places to work. The Act provides (Section 103) that a representative of the miners shall be given the opportunity to accompany the inspector during his inspection and to participate in pre- or post-inspection conferences at the mine. The representative is protected from loss of pay during his participation in the inspection. A miners' representative may request inspections of the mine if he has reasonable grounds to believe that a violation or imminent danger exists. I conclude that it is important for safety reasons that the representatives participate in manager's conferences and that such participation, subject to the limitations that it be reasonable and undertaken in good faith, may not be penalized by the mine operator. See Secretary/Truex v. Consolidation Coal Company, __FMSHRC ___ (issued September 20, 1985), Judge Gary Melick.

ADVERSE ACTION

For the reasons given in my decision in Curcio, supra, I conclude that the penalty imposed by Respondent herein -- the

assessing of an unexcused absence day -- is adverse action. The activity found to be protected resulted in the action found to be adverse. Therefore, I conclude that Respondent violated section 105(c) of the Act.

RELIEF

Therefore, IT IS ORDERED:

1. The unexcused absence assessed against claimant on April 6, 1984 shall be removed from his employment record, and his absence shall be deemed excused.

2. Respondent shall cease and desist from enforcing its absentee program against safety committee members in a manner that limits their reasonable participation in MSHA District Manager conferences concerning citations issued at the mine.

3. Respondent shall pay the costs and expenses (including attorney's fees) reasonably incurred by Complainant in connection with the institution and prosecution of this proceeding.

4. Counsel are directed to confer and attempt to agree on the amount due under paragraph 3 above, and if they can agree, to submit a statement thereof to me within 20 days of the date of this decision. If they cannot agree, Complainant shall, within 30 days of the date of this decision, file a detailed statement of the amount claimed, and Respondent shall submit a reply thereto within 20 days thereafter. This decision shall not be final until I have issued a supplemental decision on the amount due under paragraph 3.

5. Respondent shall post a copy of this decision on a bulletin board at the subject mine which is available to all employees, and it shall remain there for a period of at least 60 days.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Earl R. Pfeffer, Esq., United Mine Workers of America, 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

William M. Darr, Esq., Helvetia Coal Company, 655 Church Street, Indiana, PA 15701 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 84-346-R Citation No. 2415209; 7/24/84
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Martinka No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 85-85 A. C. No. 46-03805-03610
v.	:	Martinka No. 1 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Kennedy

After this matter came on for a hearing in Morgantown, West Virginia, the parties tendered a settlement based on vacation of the challenged citation.

Finding this proposal in accord with the purposes and policy of the Act, the trial judge approved the settlement and entered a bench decision granting the contest and dismissing the civil penalty proceeding.

The premises considered, therefore, it is ORDERED that the bench decision be, and hereby is, ADOPTED AND CONFIRMED as the final disposition of these matters.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

David M. Cohen, Esq., American Electric Power Service Corp., P. O. Box 700, Lancaster, OH 43130 (Certified Mail)

Thomas M. Brown, Esq., Office of the Solicitor, U. S. Department of Labor, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

yh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 25 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner, v. PYRO MINING COMPANY, Respondent	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 84-236 A.C. No. 15-13881-03534 Pyro No. 9 Slope William Station Mine Docket No. KENT 85-25 A.C. No. 15-13920-03525 Docket No. KENT 85-27 A.C. No. 15-13920-03527 Docket No. KENT 85-54 A.C. No. 15-13920-03530 Docket No. KENT 85-88 A.C. No. 15-13920-03536 Docket No. KENT 85-113 A.C. No. 15-13920-03543 Pyro No. 9 Wheatcroft Mine Docket No. KENT 85-52 A. C. No. 15-14492-03504 Palco Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of Petitioner; William Craft, Safety Manager, Pryo Mining Company, Sturgis, Kentucky, for Respondent.

Before: Judge Melick

These consolidated cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for alleged violations of regulatory standards. The general issues before me are whether the Pyro Mining Company (Pyro) has violated the cited regulatory standards and, if so, what is the appropriate civil penalty to be assessed in accordance

with section 110(i) of the Act. Additional issues are also addressed in this decison as they relate to specific citations and orders.

DOCKET NO. KENT 84-236

The one citation in this case (No. 2339124) as amended, alleges a "significant and substantial" violation of the mandatory standard at 30 C.F.R. § 75.1306 and charges as follows:

> The explosives and detonator cart being used on number 4 unit (ID004) to carry explosives and detonator [sic] from one (1) working place to another is not being maintained in a permissible manner. The explosives and detonator cart is between Nos. 4 and 5 entry in the last travelled crosscut with the lids open exposing loose sticks of explosives and loose detonators. Also one (1) detonator is laying on the main [sic] floor next to the cart. An energized trailing cable is approximately 22 inches from the explosives and detonator cart laying on the mine floor. Also one shuttle car is traveling this crosscut.

The standard cited after amendment, 30 C.F.R. § 75.1306, reads in relevant part as follows:

> When supplies of explosives and detonators for use in one or more working sections are stored underground, they shall be kept in section boxes or magazines of substantial construction with no metal exposed on the inside, located at least 25 feet from roadways and power wires, and in a dry well rock dusted location protected from falls of roof. . . .

Respondent alleges in his post-hearing brief that the charging language of the citation was not sufficient to state a violation of the standard cited. The citation alleged that the subject cart was used to "carry" explosives and the standard applies to the "storage" of explosives. Since a cart used to carry explosives may also be used to store explosives I find no deficiency in the charging language. It is clear, moreover, from the hearing record that Respondent was fully aware at the time of hearing of the nature of the charges and was prepared to defend against those charges. The profferred defense is accordingly rejected.

During the course of an underground inspection on July 12, 1984, Inspector James Hackney of the Federal Mine

Safety and Health Administration (MSHA) found the cited explosive cart in the number 4 unit with its lids open and "Tovex" explosives exposed. The cart also had a hole in its side some 4 inches in diameter and exposed metal inside. In addition, a power cable was located only 22 inches from the cart and a stick of the Tovex explosive and some detonator caps were lying on the ground 2 feet away. The caps had been shunted however and, according to the manufacturer, were therefore not supposed to detonate.

According to Hackney if the cable was energized and had blown-up, the caps and explosives nearby could have been detonated. In addition explosive 5.5 percent levels of methane gas were found in the No. 1 entry which, if ignited, could trigger an explosion of the Tovex. Conversely if the Tovex had exploded, the explosive levels of methane could have been drawn out of the No. 1 entry by the vacuum created thereby and have amplified the explosive forces. Finally, Hackney found shuttle car tire tracks close to the cited explosives cart, indicating that it was near a roadway and subject to collision. Since there is no dispute that the cited cart was found storing explosives within 25 feet of a power wire there was clearly a violation of the standard.

In defense, the operator suggests that Tovex is not a dangerous explosive and that, even under the circumstances cited herein, created no danger. According to William Craft, Pyro's Safety Manager, Tovex is "not near as sensitive as nitroglycerin" and does not emit toxic fumes.

The Tovex manufacturer's explanatory booklet (Exhibit P-7) warns however, not to allow any source of ignition within 50 feet of a magazine or vehicle containing Tovex. It also warns not to expose the Tovex to excessive impact, friction, electrical impulse or heat from any source and warns against storing Tovex in wet or damp places with flammable or other hazardcus material or near sources of excessive heat. It further warns against storing detonators in the same magazine with Tovex.

Within this framework of evidence it is clear that the storage of Tovex here cited violated even the manufacturer's standard of care. It may reasonably be inferred from these circumstances that the conditions constituted a "significant and substantial" violation of the cited standard. See Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984). The violation was accordingly also of a serious nature.

Negligence may also reasonably be inferred from the circumstances. The explosives cart was being used in the

cited manner in plain view observable by supervisory personnel. Considering the large size of the operator and the subject mine and what I consider to be a significant history of seven previous violations of the same standard over the 2 year period preceding the instant citation, I find that a civil penalty of $1,000 is warranted. In reaching this assessment I have not failed to consider that the cited condition was abated in accordance with MSHA's instructions in a good faith manner.

DOCKET NO. KENT 85-25

Pursuant to his investigation on July 27, 1984, of a methane and/or dust ignition at Pyro's Number 9 Wheatcroft Mine, MSHA Inspector George Siria found what he opined could have been contributing factors. In citation Number 2339004 he found a "significant and substantial" violation of the mine operator's ventilation plan under the mandatory standard at 30 C.F.R. § 75.316. The ventilation plan then in effect required at least five thousand cubic feet a minute (CFM) of air at the cited crosscut. Siria's measurement at that location of only 2250 CFM is not disputed and the violation is accordingly proven as charged.

It is further undisputed that proper ventilation will dilute and carry away coal dust and methane and other explosive or noxious gases and inadequate ventilation may very well allow coal dust and methane to build up to explosive levels. It was Siria's opinion that proper ventilation could have prevented the ignition in this case in which two miners were seriously burned. In light of the seriousness of injuries that could reasonably have been caused by inadequate ventilation it is clear that the violation was "significant and substantial". Mathies, supra, Secretary v. U.S. Steel Mining Co., Inc., 7 FMSHRC 1125 (1985). In light of the method of abatement followed in this case (extending line brattice across the last open crosscut) it is apparent that the condition had existed for a sufficent time during which the section foreman or other supervisory personnel should have known of the violation. Accordingly I find that the violation was the result of operator negligence. Secretary v. Ace Drilling Company, 2 FMSHRC 790 (1980).

Citation No. 2339005, as amended, charges a violation of the standard at 30 C.F.R. § 75.313 and alleges that "the methane monitor on the continuous miner is inoperative in that it will not deenergize the miner when checked with the test button." 30 C.F.R. § 75.313 requires, as applicable hereto, that continuous mining equipment must be provided with a methane monitor installed and maintained properly and

in an operative condition. It is not disputed that such a monitor must provide a warning when the methane concentration reaches a maximum level of one volume percentum and must deenergize the continuous miner when the concentration of methane reaches a maximum percentage of not more than 2 volume percentum.

It is undisputed that the cited methane monitor was in fact inoperative as alleged. I accept the undisputed conclusions of Inspector Siria that methane ignitions were reasonably likely in light of the existence of the permissibility violations and potential ignition sources found on the same continuous miner. See discussion of citation No. 2339006, infra. The violation was accordingly particularly serious and "significant and substantial". Mathies, supra.

In reaching this conclusion I have not disregarded the testimony of the injured miner, Frank Barber, who had been operating the continuous miner at the time of the earlier ignition. Barber opined that that ignition occured when the miner struck "jack rock" and set off a spark igniting dust but not methane. He observed that the face boss had found no methane only five minutes before the ignition. My findings herein are based however upon evidence of conditions existing at the time of the citation and not on conditions at the time of the prior ignition. The fact that the MSHA investigators were unable to pinpoint the source of that previous ignition is immaterial to this case.

I also find that the violation was the result of operator negligence. Barber admittedly did not check the operation of the methane monitor prior to the commencement of his shift that day and although he said that such examination was the responsiblity of the miner operator on the preceding shift, that examination presumably had not been performed because Barber had not been informed of the defect. This failure to check the operation of the methane monitor and/or of communicating the defects to Mr. Barber clearly demonstrates a lack of proper employee training and/or supervision. This evidence supports a finding of operator negligence. Secretary v. A.H. Smith Stone Company, 4 FMSHRC 13 (1983).

Citation No. 2339006 alleges a violation of the standard at 30 C.F.R. § 75.503 and specifically charges that the same "continuous miner was not maintained in a permissible condition in that 3 of its lights were not fastened to the miner and the conduit was pulled from the junction box at the point the trailing cable enters the box." It is not disputed that the continuous miner was in violation of the cited standard in the manner described. According to

Inspector Siria, the lights were in the "on" position when cited, indicating that they were energized. Siria opined without contradiction that the lights or the excessive gap in the junction box could provide an ignition source for methane and/or coal dust explosions. In light of the actual ignition that had already occurred and the other violative conditions cited on the same date, it is clear that this violation, too, was serious and "significant and substantial". Mathies supra.

I also find that this violation was the result of operator negligence. It may reasonably be inferred that these obvious conditions had existed for some period of time during which the section foreman or other supervisory personnel should have seen the violations. The failure of non-supervisory personnel to have corrected these obvious defects also demonstrates negligent training and/or supervision. A. H. Smith, supra.

DOCKET NO. KENT 85-27

At hearing Petitioner filed a motion to approve a settlement agreement and to dismiss this case. A reduction in penalties from $471 to $371 was proposed. I have considered the representations and documentation submitted, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

DOCKET NO. KENT 85-52

Citation No. 2505981 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 75.1103 and alleges as follows:

> "the automatic fire sensor installed on the 001-0 unit belt was inoperable. The component on the end of the line that completes the circuit was not in place. The system would not give warning should a fire occur."

The cited standard requires as relevant hereto that devices must be installed on underground belt conveyors which will give a warning automatically when a fire occurs on or near a belt. The testimony of MSHA Inspector George Newlin is not disputed that the fire sensor was in fact inoperable as alleged. According to Newlin if a fire did occur along the affected area there would be no warning. Such a fire, out of control, would emit smoke and gases including carbon monoxide and could result in fatalities to the underground miners. It is further undisputed that such fires could

result from a jammed roller developing friction heat. The violation was extremely serious and "significant and substantial" even though Inspector Newlin did not in fact find any "jammed" rollers. I do not find operator negligence without either direct or circumstantial evidence to support such a finding.

Citation No. 2505983 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400. The citation alleges as follows:

> Coal dust and float coal dust had accumulated along the full length of the No. 2 belt. Dust had settled on the mine floor and all rock dusted areas. Several bottom roller [sic] was running in water and gob.

The cited standard requires that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

The conditions cited by Inspector Newlin on October 4, 1984, are not disputed. Newlin found coal dust accumulations along the No. 2 belt up to 3 inches deep along the 1500 to 2000 foot-long belt. Any ignitions within the vicinity of the belt would be amplified by the coal dust and expose the maintenance workers in the area to serious injuries or death. The seriousness of the hazard was somewhat mitigated by the fact that the belt was located away from the face and 20% of the area was damp. I find that a "significant and substantial" and serious hazard nevertheless existed. Serious injuries were reasonably likely under the circumstances. See Secretary v. Black Diamond Coal Mining Co., 7 FMSHRC 1117 (1985).

I also find that the violation was a result of operator negligence. It may reasonably be inferred from the amount of accumulations and the large area over which they existed, that the violative conditions had existed for a sufficent period during which they should have been discovered by managerial personnel. In addition it may reasonably be inferred from the failure of other personnel working in the area to have cleaned up the accumulations that they were not properly supervised and/or trained.

Citation No. 2505987 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.503 and charges that "the Joy miner serial no. JN3119 used to mine

coal on the 001-0 unit was not maintained in permissible condition in that the panel cover on the control box was not tight when check [sic] with a 5/1000 feeler gage [sic]."

It is not disputed that the cited conditions constituted a violation of the standard. It is further undisputed that dirt prevented the cover from fitting tightly over the control box. Upon this evidence it may reasonably be inferred that the condition had existed for a sufficient period of time during which management should have detected the violation. The violation is accordingly the result of operator negligence. It is also undisputed that an arc from the control box could ignite any methane present in the environment thereby causing serious or fatal injuries from an ignition or explosion of methane or dust. The continuous miner was in fact being used at the time of the citation to cut coal and was therefore being used at the face. I determine from this evidence that the violation was "significant and substantial" and serious.

Citation No. 2505988 alleges another "significant and substantial" violation of the standard at 30 C.F.R. § 75.400. The citation alleges as follows:

> "The numbers 3, 4 and 5 heading had loose coal and coal dust in the entries and crosscut for three crosscuts outby the face. The coal ranged in depth from 0 inches to 12 inches on the 001-0 unit."

The conditions underlying the citation are not disputed. Coal dust and loose coal up to 12 inches deep extending from rib to rib across the 20 foot-wide entries were found by Inspector Newlin. The cited area was traveled by vehicles and, according to Newlin, the accumulations represented 4 or 5 days production. I find that a "significant and substantial" and serious fire and explosion hazard existed as a result of this violation. Black Diamond Co., supra. Since the accumulations represented at least several shifts of production it is clear that management should have discovered and remedied the condition well before it was cited. Accordingly the violation was the result of operator negligence.

DOCKET NO. KENT 85-54

Citation No. 2507010 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

> "Accumulations of loose coal and coal dust were present on the ribs, in faces of entries (unit now in rooms) and in last room set up on ribs and in piles. Coal ranged in depth from 0 to 4 feet in depth. Areas of last room setup needs rock-dusting to within 40 feet of faces. No. 2 unit ID001."

The cited standard provides that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein." MSHA Inspector Jerrold Pyles testifed at hearing that the cited accumulations were not found in "active workings". Accordingly, there was no violation of the cited standard and the citation must be vacated.

Citation No. 2507013 alleges a "significant and substantial" violation of the operator's roof control plan under the standard at 30 C.F.R. § 75.200. The citation alleges as follows:

> "the room necks driven on the intake side [of the No. 2 unit ID001] that are to be driven at a later date were driven more than 30 feet from center line of last entry. One was 39 feet, one 54 feet, and one 49 feet. Three of the six were driven this way."

The applicable roof control plan (Exhibit P-23 page 3) provides that "room necks driven during development that are to be driven at a later date shall not be driven more than 30 feet from the center line of the outside entry and not more than 20 feet wide until the first crosscut is turned."

According to the uncontradicted testimony of Inspector Pyles, the roofs in the cited room necks would be expected to deteriorate in the estimated 2 to 3 weeks before the operator would return to continue mining the necks. The hazard was further increased because of the proximity of the necks to crosscuts where larger roof areas were exposed. In addition, there had been a history of roof falls at this mine and the strata above the coal seam was admittedly unstable. Indeed in two of the locations cited there were visible cracks in the roof strata. While roof bolts inserted in the neck areas did reduce the severity of the hazard, I nevertheless find that the violation and its "significant and substantial" findings are proven as charged. I find the violation was the result of operator negligence because the location chosen to conduct mining activity is within the affirmative control of management.

Citation No. 2507014 alleges another violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

> Loose coal and coal dust mixed with gob had been left in old room necks driven on the intake side. These rooms were driven approximately 7 to 14 days ago. Coal were [sic] in piles of approximately 4-1/2 feet high and from 10 to 15 feet in length. 4 of the 6 room necks were like this."

Pyles testimony in support of the citation is undisputed. He found loose coal and coal dust in the cited room necks in piles 4-1/2 feet high and 10 to 15 feet in length. With an ignition source the coal and coal dust presented a serious fire and explosive hazard. The violation and its "significant and substantial" findings is accordingly proven as charged. Mathies, supra; Black Diamond Coal Co., supra. It may be reasonably be inferred that the violation was the result of operator negligence because of the large quantity of loose coal and coal dust found and because the piles had been created by an affirmative act. According to Pyles the rooms had also been driven 7 to 14 days before the conditions were cited.

Citation No. 20507016 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.503 and specifically charges as follows:

> A violation was observed on No. 2 unit (ID001) on the Joy Loader in that an opening in excess of .004 of an inch (measured with .005 guage) was found in the main control panel. Loader was in No. 4 entry preparing to load coal. Two-tenth percent of gas was found. Mine is on a 5 day spot due to an ignition which occured at this mine in Fiscal Year 84.

It is not disputed that the cited facts did exist and that they constituted a violation of the cited permissiblity standard. Inspector Pyles testified that the opening in the control panel of the loader would permit an ignition of methane or dust if arcing would occur inside. A resulting explosion could cause serious injuries to the loader operator and others working nearby. The violation is accordingly proven as charged and under the circumstances was "significant and substantial". It may reasonably be inferred that the cited equipment was not being properly inspected from the very existence of the violation and therefore some measure of negligence may also be inferred.

Citation No. 2507017 alleges a violation of the standard at 30 C.F.R. § 75.517 and charges as follows:

> The cutting machine trailing cable, located on No. 2 unit ID001, had damage to the outer jacket in 4 to 5 places. The outer jacket was cut down to the other insulation on phase wires, therefore it was not insulated adequately and fully protected. Also cutter was dirty.

The cited standard requires inter alia that power cables "shall be insulated adequately and fully protected". Inspector Pyles testified that the defective condition of the cable would weaken the cable and allow it to separate and cut the phase wires. He opined that the cable could then reel up into the machine and cause it to become energized. Persons contacting the cable or the energized equipment could thereby be electrocuted. The violation is accordingly "significant and substantial" and serious. It may reasonably be inferred from the obviously defective condition of the trailing cable that the violative condition should have been known to management and have been remedied. The failure of other employees to have corrected the condition also indicates negligent training and/or supervision.

Citation No. 2507019 alleges a "significant and substantial" violation of the operators roof control plan under 30 C.F.R. § 75.200 and charges as follows:

> "A violation of the roof control plan, dated June 22, 1984, was observed along the No. 2 unit supply road, from the 2nd main west header up to No. 2 unit, in that several crosscuts along the supply road were not timbered, some only had 1 or 2 timbers and some not at all."

The allegations are not denied by the operator. According to the roof control plan (Exhibit P-23 page 14) timbers must be installed within 240 feet of the tail piece in the crosscuts. 5 of the crosscuts had no timbers and 6 of them had only 1 or 2 timbers. The roof control plan required at least 6 timbers. Additional roof support is required in these areas because of the greater stress presented by larger areas of exposed roof. I accept the evidence that roof falls were reasonably likely under the circumstances and the violation was accordingly "significant and substantial" and serious. Operator negligence may be inferred from the obvious absence of timbers in the required quantities.

DOCKET NO. KENT 85-88

Order No. 2507020 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1704 and charges as follows:

"An intake (designated primary) escapeway was not maintained to insure passage at all times of any persons, including disabled persons, from No. 2 unit (ID001). There were 2 aircourses one of which had a roof fall in it, halfway loaded, but not supported with permanant roof supports, nor marked; therefore no exit through this area was available; the other aircourse was full of rock and not passable."

The cited standard requires in relevant part that "at least 2 separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked."

According to Inspector Pyles, he and David Sutton, the company safety director, came upon a roof fall in the No. 4 entry. Upon further examination they discovered that the No. 1 entry, the primary escapeway, was also obstructed. The roof fall in the No. 4 entry extended from rib to rib and prevented passage. Some of the rock from that fall had been removed into the No. 1 entry thereby also making that escapeway impassable. Tire tracks on the floor of the No. 1 entry indicated to Pyles that the rock and gob material had been dumped there. It is not disputed that the violation was serious in that both the primary and alternate escapeways were blocked thereby preventing miners from escaping in the event of fire or other similar hazard. The violation was accordingly serious and "significant and substantial".

It is clear that the violation was also the result of negligence. Even the company safety director, David Sutton, conceded that someone in the company must have been aware of the blocked escapeways. In spite of this knowledge the escapeways were not being cleared at this time but rather the men were working at the face extracting coal.

DOCKET NO. KENT 85-113

Citation No. 2507219 alleges a "significant and substantial" violation of the operator's roof control plan and specifically charges that "the timbers in the return in the No. 4 unit (004) was [sic] 950 feet outby the feeder."

The roof control plan (Exhibit P-31, page 14) requires that timbers be placed in the entries within 240 feet of the tailpiece. A history of roof falls in the cited area highlights the extent of the hazard and the need for the additional roof support. The violation was accordingly "significant and substantial" and serious. The violation was also the result of operator negligence. The cited areas were inspected at least weekly by the fire bosses and the violative conditions which existed for more than a week should accordingly have been discovered and remedied.

Citation No. 2507220 charges a violation of the standard at 30 C.F.R. § 75.400 for the presence of loose coal and coal dust accumulations. The citation charges in particular that the loose coal and coal dust were allowed to accumulate on the floor and connecting crosscut around the unit 4 headers. According to the undisputed testimony of MSHA Inspector Newlin, the header is the main drive unit for the conveyor belt and where coal is dumped onto another belt. The accumulations were 1 to 6 inches deep and extended 40 to 50 feet in four directions at the crosscut. It is undisputed that the existence of accumulations of this nature in close proximity to belt rollers and bearings provided a serious fire hazard. It is reasonably likely that heat from a jammed roller would provide the source of ignition. Inspector Newlin conceded however that none of the rollers were in fact jammed at the time nor were any of the rollers beneath any of the cited accumulations. In addition, some water was found in the vicinity providing some measure of fire limitation. I nevertheless find the undisputed evidence sufficient to support a finding of a "significant and substantial" and serious violation. Negligence may be inferred from the size of the accumulations.

Citation No. 2507401 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1103 and charges as follows:

> "The automatic fire sensor installed on the 3A belt was not operable. The system would not give warning should a fire occur."

The cited standard requires in essence that belts such as that cited herein be provided with automatic fire warning devices It is not disputed that the fire sensor herein was inoperable. According to the undisputed testimony of Inspector Newlin a fire along the 3A belt or inby that location would not be signaled by the sensors because the line had been severed. About 2000 or 3000 feet of the mine was affected and therefore without a functioning fire detection system. It was reasonably likely therefore that a fire commencing in that area would burn undetected for a sufficiently long period that carbon monoxide and smoke could overcome miners in the area. The violation was accordingly "significant and substantial" and serious.

I find that the violation was the result of low operator negligence. The credible evidence shows that the line had been cut earlier on the same shift as the inspection so that the violative condition had existed only briefly.

Citation No. 2507255 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1106 and charges as follows:

> "A diligent search for fire after a cutting operation was not made, which in turn caused a fire in the main return. This area was located near the old No. 1 belt entry."

The cited standard requires in relevant part that "welding, cutting, or soldering with arc or flame in other than a fire proof enclosure shall be done under the supervision of a qualified person who shall make a diligent search for fire during and after such operations".

MSHA Inspector George Siria concluded that since a fire did in fact occur, the cited employee did not in fact conduct a "diligent search" for fire. I do not agree. The undisputed testimony of the cited employee, Keith McDowell, was that he in fact searched the immediate work area after his cutting operations and found no fire. Under the circumstances the violation cannot be sustained. The citation is accordingly dismissed.

The penalties I am assessing in these cases are also based upon a consideration that the mine operator is large in size and has a moderate history of violations. I am also assuming, based upon representations at hearing, that all of the violations were abated in a timely and good faith manner. Accordingly I am assessing the penalty amounts noted below.

ORDER

Pyro Mining Company is hereby ordered to pay the following civil penalties within 30 days of the date of this decision:

Docket No.	Citation No.	Amount
KENT 84-236	2339124	$1,000
KENT 85-25	2339004	1,000
	2339005	1,000
	2339006	1,000

KENT 85-27	2505881		107
	2505884		107
	2505885		157
KENT 85-52	2505981		100
	2505983		300
	2505987		300
	2505988		300
KENT 85-54	2507010		(Vacated)
	2507013		100
	2507014		100
	2507016		300
	2507017		300
	2507019		100
KENT 85-88	2507020	(Order)	1,000
KENT 85-113	2507219		100
	2507220		200
	2507401		100
	2507255		(Vacated)
		Total	$7,871

Gary Melick
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. William Craft, Safety Manager, Pyro Mining Company, P.O. Box 267, Sturgis, KY 42459 (Certified Mail)

rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

OCT 25 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 82-167
	:	A.C. No. 42-00080-03092
v.	:	
	:	Wilberg Mine
EMERY MINING CORPORATION, Respondent	:	

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Adrienne J. Davis, Esq., Crowell & Moring, Washington, D.C., for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondent with violating a regulation promulgated under the Federal Mine Safety and Health Act, 30, U.S.C. § 801 et seq., (the Act).

After notice to the parties a hearing on the merits was held on November 14, 1984 in Salt Lake City, Utah.

The parties waived the filing of post-trial briefs and, in lieu thereof, orally argued their views.

Issues

The issues are whether the evidence establishes that an accident occurred within the meaning of the MSHA regulations. If an accident occurred, then the operator was obliged to report the event to MSHA.

Citation 1237680

This citation alleges respondent violated 30 C.F.R. § 50.10, which provides as follows:

> § 50.10 Immediate notification. If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free at (202) 783-5582.

Stipulation

At the commencement of the hearing the parties stipulated that there was coverage under the Act. In addition, Emery, a large operator, produced 3,938,101 tons of coal. The mine involved here produced 1,130, 824 tons for the year applicable to the citation. The mine's history is average and respondent's good faith is established by its abatement of the citation (Tr. 5, 6).

Summary of the Evidence

Dick Kourtney Jones, a federal coal mine inspector, inspected Emery's Wilberg mine in February, 1982. (Tr. 13-16).

When the inspection party arrived at First Right the inspector found that there had been a massive fall on top of a continuous miner (CM). Workers were setting timbers to support the top which was still loose and dribbling (Tr. 16).

The CM, 10 feet wide and 40 feet long, was half buried in rock. The fall extended from the cutter bits on the head back to approximately a foot inby the cab. The rock directly over the cab was fractured and broken (Tr. 17, 18). The fall of the rock had broken the hydraulic system. As a result, the passage of the CM was impeded (Tr. 19); further, it was hazardous for the CM operator when he exited the machine (Tr. 18).

The portion of the definition that discusses the anchorage zone in active workings applies in this situation. The Emery plan prohibits anchoring below three feet. In this section they were using five foot roof bolts (Tr. 19, 20). The cave-in portion affected the zone where the bolts were anchored but no roof bolts had caved out. However, there were no bolts in the area where the equipment was removing the pillar. This is where the CM was making its cut (Tr. 21).

The inspector did not measure the ventilation but, in his opinion, the ventilation was impaired to some extent because four feet of rock caved on a four-foot CM in an eight-foot entry (Tr. 21, 22).

It is MSHA's duty to evaluate an operator's roof control plan. Accordingly, it was necessary for MSHA to know about any unplanned roof falls over equipment operated by miners (Tr. 22). A month before this incident Emery reported, as a roof fall, an event similar to this situation (Tr. 23).

Dixon Peacock and Jay Butterfield testified for Emery.

Witness Peacock, Emery's safety director, was familiar with the room and pillar retreat mining at this location (Tr. 45, 47).

The witness described in detail how the area was mined (Tr. 49-54). Retreat mining removes pillars of coal, about 80 foot square, in sequence. As the pillars are removed the roof caves; this release of pressure makes further extraction safer (Tr. 50, 51). Emery's roof control plan in effect on the date of this incident contains a drawing depicting the sequence of the coal removal (Tr. 52; Joint Exhibit 1). The cut made through the middle of a pillar is known as a split. After a split is made breaker rolls are set. Breaker rolls are straight grain timber set on four-foot centers. Double rows are placed across an entry. All but the last ten-feet of the cut is roof bolted (Tr. 54).

Each diagonal cut is known as a lift. The procedure is to establish a split and then begin to extract the left or right side of the pillar (Tr. 55, 56). The roof caves in when it is no longer supported (Tr. 56).

Peacock visited the area after the roof fall occurred. The roof had fallen in the area where retreat mining was being conducted. The area of the roof fall was not a traffic way, entry or escapeway (Tr. 59). Only the CM is allowed in the area while it is cutting. Further, Emery expected that the unsupported pillared out area would fall (Tr. 59, 60).

The roof above the miner was not roof bolted because the area was in a lift section where roof bolting was not required (Tr. 61). During retreat mining it is not uncommon to get some material on the head of the miner when you break through the end wall (Tr. 61). When working on a particular pillar it's common for a previously extracted roof to fall (Tr. 61). The size of a roof fall varies; it is not straight and rectangular but it can range from small to massive pieces; or it can dribble, and it may last for sometime (Tr. 62).

The witness felt that the roof fall was not a reportable accident because it did not impede passage of any person or ventilation. Nor did it affect the anchorage (Tr. 63, 64). However, the witness agreed that the company did not plan to have the roof fall on its equipment (Tr. 66).

Jay Butterfield, the CM operator, testified concerning his operation of the CM at the time of the roof fall (Tr. 82-88). A hand drawn exhibit also illustrated his testimony (Tr. 84; Exhibit R3). Before this particular roof fall occurred portions of another extracted pillar had fallen (Tr. 85, 86; Exhibit R3).

When this roof fell the CM had broken through the end wall of the lift. The roof itself was not roof bolted at that point (Tr. 87).

Timbers were set at the crosscuts. The area of the roof fall was not a travelway, escapeway or entry (Tr. 90). No miners were inby the CM; nor were any miners allowed to proceed into the area that was eventually covered by the roof fall. In addition, the area had been "dangered off" (Tr. 90, 91).

Butterfield did not observe any rock fall in the area of the roof bolts (Tr. 91). There were no roof bolts above the CM (Tr. 91). After the fall the CM backed up until the head dropped to the ground due to the loss of hydraulic pressure (Tr. 92). If the hydraulic system had not been damaged the CM could have backed out (Tr. 92, 93).

The roof was secured after the fall. In the process additional roof material was pulled down on the CM (Tr. 93, 94).

If the CM had been operative Butterfield would have backed it out, cleaned it and checked for permissibility. Next, they would have set the roller timbers and started another lift (Tr. 95, 96, 107). He would not have re-entered the area in an attempt to clean it out (Tr. 95).

After the roof fall ventilation of the section was not impaired (Tr. 97). Even in a planned roof fall it is not uncommon for roof material to land on the CM (Tr. 98, 99, 108). But they didn't plan to have rock fall on the vehicle. However, it can happen at any time because nothing is supporting the top (Tr. 108).

Discussion

The parties agree that the operator's obligation to report under 30 C.F.R. § 50.10 is, in turn, dependent on the construction of the definition as contained in 30 C.F.R. § 50.2(h)(8).

I agree that the latter section, in this case, defines the factual perimeters of whether a reportable accident occurred. The section provides as follows:

> (8) - An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or a roof or rib fall on active workings which impairs ventilation or impedes passage.

The foregoing definition of an accident encompasses two basic situations. At the outset an accident is reportable if the unplanned roof fall occurs at or above the anchorage zone in active workings where roof bolts are in use. This portion is not applicable here simply because there were no roof bolts in use above the miner. While roof bolts were in use at some location in the mine no bolts were in use nor were they required in this immediate area.

A portion of the testimony as well as MSHA's arguments deal with whether the roof fall was "at or above the anchorage zone." (Tr. 29, 31). I do not find that evidence to be relevant since the anchorage zone only becomes a factor where roof bolts are in use. All of the witnesses agree that there were no roof bolts in use where the CM was making its cut (Tr. 21, 71, 72).

The second definition in the section requires that an accident should be reported if the fall "impairs ventilation or impedes passage." The inspector expressed the view that the ventilation was impaired "to some extent" (Tr. 21). He based his opinion on the fact that four feet of rock had caved on a four-foot miner in an eight-foot entry (Tr. 22).

I am not persuaded that the facts support the inspector's opinion. Ventilation efficiency is a measurable quantity. A recognized authority, A Dictionary of Mining, Mineral, and Related Terms, published by U.S. Department of Interior, 1968 at page 120 states:

> ventilation efficiency. One measure of the efficiency of a mine ventilation system is the ratio of the total amount (volume in cubic feet per minute) of air handled by the fan to the total amount of air actually getting to the working faces. If 200,000 cubic feet per minute are handled by the fan and only 100,000 get to the working faces, the efficiency is only 50 percent. Kentucky, p. 85. See also overall ventilation efficiency; thermometric fan test; ventilation standards; volumetric efficiency. Nelson.

I accordingly reject the inspector's opinion and I credit Emery's contrary evidence to the effect that the roof fall did not impair the ventilation (Tr. 63, 97). Emery's miners had not measured the ventilation; however, miners working in ventilated passages before and after a roof fall would be in a better position to evaluate the flow of air than a person who arrives after the ventilation is allegedly impaired.

An additional issue focuses on whether the roof fall impeded "passage." The term "passage", not otherwise defined in the regulations, by common usage, means, in part:

> the action or process of passing from one place or condition to another; a way of exit or entrance: a road, path, channel, or course by which something passes; Webster's New Collegiate Dictionary, 1979 at 830.

See also the definition in the Department of Interior dictionary, supra at page 796, which defines a passage, in part, as:

> A cavern opening having greater length than height or width, large enough for human entrance and larger by comparsion than a lead. An underground tunnel or roadway in metalliferous mines.

In this case it is uncontroverted that no person could proceed beyond the CM. Further, the area of the roof fall was not a travelway, escapeway or entry and the area was "dangered off" (Tr. 90, 91). It accordingly follows that there was no passage that could have been impeded. In addition, the movement of the CM was not impeded. In fact, after the roof fall the CM continued to back until the loss of hydraulic pressure caused the head to drop to the ground. This immobilized the CM. (Tr. 92, 103). I further note that there was no difficulty in removing the CM with retriever equipment (Tr. 94).

The Secretary also argues that there can be unplanned roof falls even in retreat mining. He declares that no operator permits rock to fall on its equipment such as occurred here. This argument finds support in the inspector's testimony that the roof failed over where they were mining coal. Hence, it is unplanned because it occurred back behind breaker rows which serve to stop a cave-in (Tr. 41, 63).

The Secretary is asking the Commission to redraft his definition of an accident. If he desires such a definition, as he has outlined in his argument, he should follow his rule making procedures.

In support of his case the Secretary also relies on United States Steel Corporation, IBMA, 1 MSHC 1585, 1 MSHC 1585 (1977).

The above cited case, decided by the Interior Board of Mine Operations Appeals, considered a similar factual situation. The Board ruled that the unintentional covering of a continuous miner by a planned roof fall was an accident requiring immediate notification.

The regulation considered by the Board was considerably broader than the one in contest here. It provided, in part, that an "accident" means: "any other event that could have resulted in the death or injury had any person been in the immediate area" 1 MSHC at 1586. For this reason the cited case is not persuasive authority.

Conclusions of Law

Based on the entire record and the findings herein I enter the following conclusions of law:

1. The Commission has jurisdiction to decide this case.

2. Respondent did not violate 30 C.F.R. § 50.10 and Citation 1237680 should be vacated.

ORDER

Based on the findings of fact and conclusions of law herein I enter the following order:

Citation 1237680 and all penalties therefor are vacated.

John J. Morris
Administrative Law Judge

Distribution:

Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Adrienne J. Davis, Esq., Crowell & Moring, 1100 Connecticut Avenue, N.W. Washington, D.C. 20036 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

OCT 28 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 84-48-M A.C. No. 05-00516-05506
v.	:	Leadville Unit
ASARCO INCORPORATED - NORTHWESTERN MINING DEPARTMENT, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Earl K. Madsen, Esq., Bradley, Campbell & Carney, Golden, Colorado, for Respondent.

Before: Judge Carlson

GENERAL BACKGROUND

This civil penalty proceeding arose out of a federal inspection of the Leadville, Colorado mine of ASARCO, Incorporated (ASARCO). The mine inspector issued a citation which charged that ASARCO violated the mandatory safety standard found at 30 C.F.R. § 57.3-22. 1/ Specifically, the citation alleged that a miner drilling at the face of the 15-25-300 stope suffered a broken foot when a large quantity of loose rock came down. The Secretary of Labor (Secretary) proposes a civil penalty of $119.00 which ASARCO contests. Following an evidentiary hearing in Denver, Colorado, both parties filed extensive post-hearing briefs.

1/ That standard provides:

> Mandatory. Miners shall examine and test the back, face and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

REVIEW AND DISCUSSION OF THE FACTS

There are no significant conflicts concerning the facts. At the outset counsel stipulated that on September 29, 1983 an ASARCO miner, Alan H. Lysne, suffered a broken bone in his foot because of a fall of rock from a face upon which he was drilling. The inspector who testified for the Secretary and the several witnesses who testified for ASARCO agreed that the miner had proceeded to drill an unstable face which plainly required barring down.

The parties also agree that on September 28, 1983, the back and ribs in the south one heading of stope 15-25-300 were loose and dangerous, requiring barring down and bolting. Elmer Nichols, the inspector who conducted the accident investigation on the 29th, had noted this condition on the 28th and had discussed it with ASARCO's safety engineer, its general mine foreman, its mine superintendent, and its unit manager of the Leadville Unit.

Miners could not bar or bolt at the time the inspector was present because mucking was in progress. The company officials agreed with the inspectors, however, that the face could not be advanced until the loose rock conditions were corrected. To that end, the undisputed evidence shows that Daniel Welch, the shift boss on the 28th and 29th, instructed Alan Lysne on the 28th to bar down the back and do what was necessary to make the dangerous area safe. The evidence also showed that mine foreman Ray Bond told Lysne to make the area safe before doing any more blasting.

George Naranjo, the other miner in the stope, received instructions from Mr. Bond to help Lysne bar down and bolt the area.

The evidence is not so clear as to how much the two miners did to secure the back and ribs on September 28. Their time cards for that date show both spent time in ground support activities that day (respondent's exhibit 3). More important, immediately after the accident it was apparent to all observers that the back had been bolted and mats installed. The shift report confirms that five mats (with three bolts each) were installed in the back. Naranjo was not present at the face when Lysne was injured.

Safety Engineer Louis Eversole's internal report prepared for the company (exhibit P-2), which was countersigned by Roy Bond, mine forman, and Elmer E. Nichols, the mine inspector, acknowledged that over a ton of rock had been barred down <u>after</u> the accident. Also, the signers agreed that "more barring down was needed and they [the miners] could have bolted the ribs, plus they needed at least one mat in the back."

The evidence shows that when the federal inspector and supervisory or management personnel of ASARCO were in the 15-25-300 stope on the day before the accident, the face, unlike the back and ribs, could not be seen. Any possible view of the face was obscured by muck. I find as fact, however, that the orders given to Lysne on September 28 were broad enough to include the adjacent face, should it have appeared unstable, as indeed it did. Besides, the routine procedures at the mine would have required barring down even had there been no specific instructions.

ASARCO has contended from the beginning that the Secretary is attempting to impose a doctrine of strict liability where none is justified by the standard in question or the Act itself. ASARCO looks to the first sentence of 30 C.F.R. § 57.3-22 which declares that:

> Miners shall examine and test the back, face and rib of their working places at the beginning of each shift and frequently thereafter. (Emphasis supplied.)

This plain language, ASARCO argues, places the obligation for compliance squarely upon the miner, not the operator. ASARCO also reviews the Act extensively and concludes that none of its provisions, expressly or by implication, may be construed to permit a policy of strict liability. Accordingly, then, an operator cannot be held liable if its supervisory personnel are free of negligence.

I find no merit in respondent's argument. Ordinary miners, we may be certain, not management or supervisory employees, do most of the work in mines. This necessarily includes hazardous work. Ultimately, then, whether work is done safely or unsafely depends upon how the miners perform it. The Act, however, recognizes that the performance of miners is largely governed by the supervision, direction, and control of the operator. The Act abounds with declarations that the compliance burden rests with the operator. The statutory provisions will not be repeated here, but are referred to in the considerable number of cases which hold that an operator is liable without fault for violations committed by its employees. See, for example, Allied Products Company v. FMSHRC, 666 F.2d 890 (5th Cir. 1982); Kerr-McGee Corporation, 3 FMSHRC 2496 (November 1981); American Materials Corporation, 4 FMSHRC 415 (March 1982); United States Steel Corporation, 1 FMSHRC 1306 (September 1979). The evidence shows that the face at which Lysne was working was plainly unstable: more than a ton of material was barred down after the accident. Unless he approached the face with his eyes closed before drilling, he could scarcely have failed to notice its dangerous condition. It is equally obvious that he did not "examine and test" the face "frequently" after his shift began. And most certainly he ignored that part of the standard which commands that:

> Loose ground shall be taken down or adequately supported before any other work is done.

These omissions must be imputed to ASARCO under the strict liability doctrine inherent in the Act. 1/

A large question remains, however, concerning the appropriate penalty consequences. The Secretary in his brief declares forthrightly that the "effectiveness of ASARCO supervision is not in issue in this case." (Petitioner's brief at 4.) I have carefully reviewed the evidence bearing on both miner training and the efforts of ASARCO's supervisors, and must agree.

The virtually undisputed facts disclose that at the ASARCO Black Cloud Mine, barring down loose ground was an ordinary and almost inevitable phase of the mining cycle. At some locations in the mine loose ground is a greater problem than in others. This was true of the 15-25-300 stope where Lysne was injured. A part of the strata in the stope, including a part of the face, involved a geological feature known as the Hellena Fault. Ground control in the fault area was more demanding because the materials in the fault area are looser than elsewhere. The fault, however, appears at a number of points in the mine workings and was not unfamiliar to miners (Tr. 214).

As to the thoroughness of ASARCO's training and supervision of miners, particularly the injured miner, I must find that both were adequate under all the circumstances. ASARCO's evidence showed that ground control was a routine duty of miners such as Lysne and Naranjo, and that both had nevertheless been specifically instructed by superiors to bar down and bolt the stope in question. Pages 10 through 12 of ASARCO's booklet of safety rules (respondent's exhibit 2), stresses the necessity for barring down all loose ground, and the proper techniques for doing so. The rules were distributed to all miners, who signed for them and were responsible for knowing their contents. Employees are also required to attend monthly safety meetings where the rules, including ground control rules, were explained. Lysne attended these meetings (Tr. 89-92). Lysne had worked in the mine since 1972.

1/ ASARCO, in its brief, cites a number of judges' decisions and a single Commission decision which deal with alleged violations of the same ground control standard involved here. ASARCO argues that none of these decisions found the mine operator strictly liable. If strict liability were the rule, the argument proceeds, surely some mention of that rule would have appeared in the cases. The argument is not persuasive. All eight cases, as do most cases under the Act, turned on simple issues of whether or not a violation occurred under the facts. Several involved vacations because the standard was inapplicable; the others were affirmations where the standard did apply. In none were there findings that would tend to raise the strict liability issue.

The evidence shows that ASARCO maintained a program of sanctions designed to discipline employees for safety violations. These range from verbal reprimands to outright dismissals.

The undisputed evidence shows that several supervisors visit all the stopes on a regular, daily basis, and had indeed been in the stope in question on the day before the accident and had specifically instructed Lysne to give his first attention to ground control the next day. Lysne's decision to begin drilling on an obviously unstable face must be regarded as unforeseeable and idiosyncratic.

Despite his concession that the accident was not the result of a supervisory failure, the Secretary in his brief appears to suggest that there was such a failure. The brief extracts portions of the transcript in which Lysne's shift foreman, Daniel Welch, acknowledged that he had experienced problems with the miner before about barring down (Tr. 179-180). The Secretary's approach would appear to be that (1) since supervisory personnel knew on September 28 that the stope needed bolting and barring, and (2) since Lysne had sometimes been reluctant to bar down before, ASARCO should have had a supervisor on hand at the beginning of Lysne's shift on September 29 to make certain that he did what he was told to do on the day before.

The essence of Welch's testimony, however, was that barring down was hard work and that Lysne sometimes had to be told to bar down. In this instance, however, Lysne had been told to make the ground in the stope safe, and Welch's past experience with the miner had shown that he could be relied upon to follow through on specific instructions (Tr. 177-179). Lysne had accumulated only four warning notices for safety violations in his file since 1972 (respondent's exhibit 7), which was fewer than the average miner (Tr. 99-100). Only two of those involved ground control.

On balance, this evidence does not present a picture of supervisory dereliction. The result might have been different had Lysne not been specifically directed to bar down before working at the face, if Welch had truly had strong reason to suspect that Lysne would disobey the direct command to bar down, or if bolting and barring down had not been a routine requirement in carrying out the mining cycle. To hold that ASARCO had a duty to have a supervisor present at the beginning of the September 29 morning shift would be tantamount to holding that a mine operator must provide one-to-one supervision of all miners at all times. Nowhere does the Act or the standard in question suggest such a draconian requirement. The operator, under the facts of record, was not negligent.

The Secretary proposes a civil penalty of $119.00. For the reasons which follow, I find the proposal excessive. Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to remain in business, and the gravity of the violation itself.

The evidence shows that the Leadville Unit of ASARCO employed 140 miners at the time in question. No evidence was furnished about the size of the corporation itself. It is undisputed that ASARCO achieved speedy abatement of the violative conditions. Its history of prior violations was favorable. MSHA records showed only 11 violations and a total of $220.00 in penalties for the two years preceding the present infraction. No evidence was presented concerning the effect of the payment of the proposed penalty on ASARCO's ability to remain in business. The violation was obviously grave; the miner suffered a broken foot, and the injury could easily have been far more severe. In this case, however, these elements are all overshadowed by the negligence factor. Since I have held that ASARCO was not negligent, the penalty cannot be large. Considering all the statutory elements, with particular emphasis on ASARCO's lack of negligence, I conclude that $25.00 is a reasonable and appropriate penalty.

One final matter must be considered. The Secretary has classified the violation in this case as "significant and substantial" within the meaning of the Act. The Commission in Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981) set out the test for determining whether a violation, in the words of the statute, " ... could significantly and substantially contribute to the cause and effect ... of a mine safety or health hazard." Such a violation, the Commission held, is one where there exists " ... a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." In the present case, the unstable face clearly met those tests. The violation here was significant and substantial. (The presence or absence of operator negligence does not have relevance in determining the existence of a significant and substantial violation.)

CONCLUSIONS OF LAW

Based upon the entire record and upon the factual findings made in the narrative portions of this decision, the following conclusions of law are made:

(1) The Commission has jurisdiction to decide this case.

(2) The respondent, ASARCO, violated the mandatory safety standard published at 30 C.F.R. § 57.3-22.

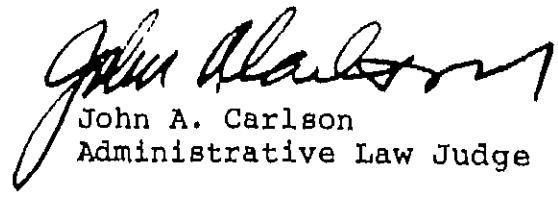
(3) The violation was significant and substantial.

(4) ASARCO is liable for the violation despite the fact that it was not itself negligent.

(5) An appropriate penalty for the violation is $25.00.

ORDER

Accordingly, the citation is ORDERED affirmed; and ASARCO is ORDERED to pay a civil penalty of $25.00 within 30 days of the date of this decision.



John A. Carlson
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Earl K. Madsen, Esq., Bradley, Campbell & Carney, 1717 Washington Avenue, Golden, Colorado 80401 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 29 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 85-123
	:	A.C. No. 15-13937-03501 E7L
v.	:	
	:	No. 4 Surface Mine
J & K TRUCKING, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Leon L. Hollon, Esq., Hollon, Hollon & Hollon, Hazard, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). At hearing the parties filed a joint motion to approve a settlement agreement and to dismiss the case. Respondent has agreed to pay the proposed penalty of $68 in full. In connection with that motion a complete "Report of Investigation" by MSHA was also filed. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $68 within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Leon L. Hollon, Esq., Hollon, Hollon & Hollon, P.O. Drawer 779, Hazard, KY 41701 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

OCT 29 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. LAKE 85-90
	:	A.C. No. 33-00968-03605
v.	:	
	:	Nelms No. 2 Mine
YOUGHIOGHENY & OHIO COAL CO., Respondent	:	

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner;
Robert C. Kota, Esq., St. Clairsville, Ohio, for Respondent.

Before: Judge Melick

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act" for three violations of regulatory standards. The general issues before me are whether the Youghiogeny & Ohio Coal Company (Y&O) violated the cited regulatory standards and, if so, whether those violations were of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard i.e., whether the violations were "significant and substantial." If violations are found it will also be necessary to determine the appropriate civil penality to be assessed in accordance with section 110(i) of the Act.[1]

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[1]Two of the three violations alleged in this case are incorporated in orders issued pursuant to section 104(d)(2) of the Act and are the subject of separate contest proceedings assigned to this judge. The parties agreed that should the violations cited in these orders be upheld in this proceeding that a ruling on the validity of the orders per se be deferred by the undersigned until such time as the validity of the corresponding precedential section 104(d)(1) citation and section 104(d)(1) order is determined by the judge's to whom they are presently assigned. If these orders should not be upheld Petitioner indicated that he would seek to modify the orders to citations under section 104(a) of the Act. See Secretary v. Consolidation Coal Co., 4 FMSHRC 1791 (1982). The decision in this civil penalty proceeding is being issued because the validity of the violations incorporated within the subject orders and the appropriate penalty to be assessed are separate and distinct issues.

Citation No. 2494894 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.302(a) and charges as follows:

> A line brattice or other approved device was not installed in a room drove [sic] off the the entry at 48 + 49 where the No. EO965 roof bolting machine was being operated at the face. The room was drive [sic] 64 feet inby the neck of E entry. Accumulations of methane measuring 2.5% to 3.5% were found in the face area. Measurements were taken with an approved methane detector and a bottle sample to substantiate this condition.

The cited standard requires that "properly installed and adequately maintained line brattice or the other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and noxious gases, dust and explosive fumes."

Respondent concedes that the violation existed as alleged and that if the cited conditions were allowed to continue there could have been "serious" consequences. According to MSHA Inspector James Jeffers the mine operator's failure to have properly installed line curtains presented an "imminent danger" of death or great bodily harm to the miners working in this section. Methane accumulations of 2.5% to 3.5% were found in the face area of the room not properly ventilated. A roof bolter operating at the face area provided an ignition source from an electrical defect or sparks from the drill bit striking rock. While Respondent claims there was no "imminent danger" it concedes that the conditions presented a "bad situation" and, if allowed to continue, could have led to "serious" injury. The violation was accordingly of high gravity and "significant and substantial". Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984).

The violation was also the result of operator negligence. It is not disputed that the section foreman was working in close proximity to the violative conditions and was in a position to see that the line curtain had not been hung. Indeed, at the conclusion of its own investigation of the incident, Respondent discharged the foreman in charge of that section because of this negligence. It is not disputed that the cited conditions were corrected immediately.

In assessing a penalty for this violation I have considered Respondent's acknowlegment of the seriousness of the violation and its swift disciplinary action against the responsible section foreman. Such prompt and severe disciplinary action sends a strong and clear message to all mine personnel that such negligence will not be tolerated. Considering the size of the operator and its history of violations in light of the above factors I find that a penalty of $400 is warranted.

Order No. 2330533 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

> Accumulations of float coal dust was [sic] permitted to accumulate in the A return entry as follows: (1) from the section return regulator at approx 0 + 15 inby to 2 + 96, heavy black in color/deposits of float coal dust was [sic] deposited on the rock dusted surface areas of the mine floor and all connecting cross cuts (2) from 2 + 96 inby to 6 + 50 heavy black in color deposits of float coal dust was [sic] deposited on the rock dusted surface areas of the mine roof, rib, and floor and all connecting cross-cuts. This return air course is to be examined once each week. The condition should have been observed and corrected.

The cited standard requires that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings."

Respondent again concedes the existence of the violation but maintains that the violation was not as serious as alleged and that it was not the result of operator negligence.

According to Inspector Jeffers the float coal dust was first found in the 1 East Main North No. 2 Section over a distance of 250 feet inby the regulator. The color of the coal dust was gray at first but became darker as the inspection party moved closer to the section. Over the next 400 feet the coal dust was "very black" and covered all surface areas. According to Jeffers the cited area was part of the active working section in which electrical equipment such as ventilation fans, a battery charger and a rock dusting machine would be working. Jeffers opined that the accumulations found would propagate fire or explosion exposing the seven miners working inby to serious injuries. He also

observed that there had been a prior iginion at this mine of hydrogen gas emitted from that battery charger.

Don Statler, Assistant Safety Director for the Nelms No. 2 mine, testified that the first 400 feet of the cited section had been adequately rock dusted but conceded that from that point to the face there was indeed a deposit of coal dust on the surface area. He felt that the violation was not serious however because he was not aware of any ignition sources. Statler did not, however, contravene the testimony of Inspector Jeffers as to the presense of a battery charger and the fact that electrical equipment such as a rock duster and ventilation fan would be used in the cited area. Indeed, Statler conceded that float coal dust is highly combustible and not safe to have on top of rock dust. He further conceded that the air course was not in a safe condition and that he was "surprised" to find the coal dust so "black" in the last 500 feet to 600 feet to the face. Under the circumstances I find that the violation was indeed quite serious and "significant and substantial". Mathies Coal Co., supra.

Statler also conceded that a fire boss or section foreman should have discovered the existance of the float coal dust and he was again "surprised" that it had not been found. According to Inspector Jeffers a certified mine examiner is required by regulation to go into the cited area once every 4 hours to perform methane tests, and, during the course of such examinations, should have seen the plainly visible violation. Within this framework it is apparent that the violation was also the result of operator negligence.[2]

Considering that the operator abated the condition in a timely manner I find that a civil penalty of $750 is appropriate for the violation.

Order No. 2330535 alleges a "significant and substantial" violation of the regulatory standard at 30 C.F.R. § 75.305 and charges as follows:

> The absence of dates, times and initials indicates that the weekly examinations of the left and right return air courses were not being conducted. There was [sic] no entries made in

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[2]This evidence also supports the finding of unwarrantable failure. Unwarrantable failure is defined as the failure of the mine operator to abate a condition that he knew or should have known existed or the failure to abate because of indifferance or lack of due diligence or reasonable care. Ziegler Coal Corp., 7 IBMA 280 (1977).

the approved book on the surface that the return air courses had ever been examined on a weekly basis.

Respondent does not dispute that the cited standard requires weekly examinations to be performed in the left and right return air courses as alleged but maintains that proper examinations were being made. It concedes that the examinations had not been recorded as required but suggests that this was a mere "technicality". The credible evidence does not however support the purported defense. It is not disputed that during Jeffers' inspection of the right and left air courses neither he nor the company representative, Don Statler, were able to locate any dates or initials of mine examiners in the entire 1,300 feet. Returning to the surface, the examination party along with the company safety director looked at the corresponding record books and were unable to find any evidence of entries corresponding to an examination of the cited air courses. The examination book covered a 3 month period preceding the date of inspection. In addition, as recently as the filing of the Respondent's Answer in these proceedings on September 12, 1985, Respondent conceded that the examinations had not been properly recorded.

At hearing however, Statler testified that book entries did exist corresponding to examinations of the right and left air courses through March 13, 1985, but that there were no entries between that date and the date of the inspection at issue, April 9, 1985. Statler conceded that he did not know whether the designated mine examiner had been examining the returns as required. The examiner had since been laid off and Statler had been unable to contact him.

Statler conceded however that for this 4 week period there was in fact no record of examination of the air courses in the appropriate examination books and that he did not know whether the examinations had actually been performed. He further conceded that he was "surprised" that no markings from the mine examiners were found in the cited air courses and that it was indeed hazardous to fail to conduct such examinations.

According to Inspector Jeffers, the failure to have conducted the examinations of the air courses as required was particularly hazardous in light of the float coal dust cited in the previous order. These accumulations should have been discovered in the course of such examinations and eliminated before leading to the more serious fire and explosive hazards described in connection with the previous order. Within this framework I conclude that the violation was indeed serious

and "significant and substantial". Mathies Coal Co., supra. Inasmuch as the book entries are required to be countersigned by mine officials following each mine examiner's entry, those mine officials should have known of the failure to have made the appropriate entries and also of the failure to have made proper inspections.[3]

Under the circumstances a civil penalty of $750 is appropriate.

ORDER

The Youghiogheny & Ohio Coal Company is hereby Ordered to pay the following civil penalties within 30 days of the date of this decision:

Citation No. 2494894	$400
Order No. 2330533	$750
Order No. 2330535	$750
Total	1,900

Gary Melick
Administrative Law Judge

Distribution:

Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

Robert C. Kota, Esq., The Youghiogheny & Ohio Coal Company, P.O. Box 1000, St. Clairsville, OH 43950 (Certified Mail)

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[3]For the same reasons the violation was also the result of "unwarrantable failure".